

## Missouri Attorney General's Opinions - 1965

Opinion	Date	Topic	Summary
<a href="#">5-65</a>	May 24	TAXATION - EXEMPTIONS. LIENS. ASSESSMENTS LEVY. UNITED STATES PROPERTY.	If state taxes have become a lien on Missouri real property during the time of private ownership, this lien continues to be an encumbrance on the property after acquisition by the Small Business Administration, but the lien is not enforceable as long as the Federal Government holds title. Also, the property is not subject to new levy and assessment for taxes while title is in the Federal Government.
<a href="#">7-65</a>	Feb 3		Opinion letter to M. D. Overholser, M.D.
<a href="#">8-65</a>	Feb 3	CIRCUIT CLERKS. FEES. RECORDER OF DEEDS.	All fees received by a circuit clerk or a circuit clerk acting as ex officio recorder of deeds for certifying documents under his control by virtue of his office as circuit clerk or recorder of deeds may not be retained but must be paid into the county treasury.
<a href="#">9-65</a>	Mar 5		Opinion letter to the State Tax Commission of Missouri
<a href="#">12-65</a>	Feb 4	COSMETOLOGY BOARD. BOARD OF COSMETOLOGY.	Use of brush rollers brought into a cosmetology shop or school by a patrol to be used solely and exclusively upon the head of such patron is not prohibited.
13-65	Jan 29		Withdrawn
<a href="#">16-65</a>	Feb 4	BOARD OF COSMETOLOGY. COSMETOLOGY BOARD. LICENSES. SCHOOL DISTRICTS.	(1) Local school district that desires to operate a school of cosmetology must apply for registration and pay annual fee of \$125.00. (2) Students of such schools must be registered and pay the student license fee.
<a href="#">17-65</a>	June 28	INSURANCE.	Amendment of Articles of Incorporation of Old American Insurance Company.
<a href="#">18-65</a>	Mar 23		Opinion letter to the Honorable J. R. Fritz
<a href="#">23-65</a>	Feb 10	APPROPRIATIONS. CONSERVATION COMMISSION OUTDOOR RECREATION. SOIL AND WATER DISTRICTS.	(1) Soil and water districts, so long as they are acting within their powers granted them by state statute may be eligible to receive funds from Public Law 88-578 where federal requirements are met; (2) however, an appropriation would be needed to transmit these funds from the State to local government units; and (3) the designation of the Inter-Agency Council for Outdoor Recreation as the state agency in Missouri would be in conformity to Public Law 88-578.

24-65	Mar 8		Withdrawn
<a href="#">25-65</a>	Dec 23	CHARTER CITIES. LICENSE TAX. VENDING MACHINES. MUNICIPAL CORPORATIONS. SCHOOL DISTRICT.	A constitutional charter city, if authorized by the charter, may impose a license tax on vending machines owned or rented by a school district and located within such city, as the tax imposed is not on property owned by the school district, but on the privilege of using such vending machines.
<a href="#">30-65</a>	Jan 14		Opinion letter to the Honorable Peter J. Grewach
<a href="#">31-65</a>	Jan 26		Opinion letter to the Honorable Paul D. Hess, Jr.
<a href="#">32-65</a>	Jan 20		Opinion letter to the Honorable Lloyd J. Baker
33-65	Feb 26		Withdrawn
<a href="#">34-65</a>	Jan 20	OFFICERS. COUNTY TREASURER EX OFFICIO COLLECTOR. TOWNSHIP ASSESSOR. COUNTY BOARD OF EQUALIZATION. BOND. COMPATIBILITY OF OFFICES.	There is no prohibition against a person who is presently township assessor and is also county treasurer ex officio collector-elect, from continuing his duties as township assessor until he assumes the duties as county treasurer ex officio collector. The bonds which must be given by a county treasurer ex officio collector in a county under township organization are the bonds required by Sections 54.070 and 52.020, RSMo Cum. Supp. 1963. A person who resigns as township assessor and then becomes county treasurer ex officio collector, is no longer a qualified member of the county Board of Equalization.
<a href="#">37-65</a>	Feb 25		Opinion letter to the Honorable Allen S. Parish
<a href="#">38-65</a>	June 7	STATE MENTAL HOSPITALS. COUNTY COURTS. PROBATE COURTS. INSANE PERSONS. INDIGENT PERSONS.	With respect to mentally ill persons, Sections 202.780 to 202.870, RSMo 1959: (1) Section 202.863 requires patients be classified as private or county patients and that county court hold hearing within ten days after notice by superintendent to determine indigency, subject to review by circuit court; (2) Sections 202.220 and 202.240 apply and permit redetermination by probate court of patient's pay status; (3) Section 31.050, RSMo Cum. Supp. 1963, requires superintendent to return patient to responsible party upon failure to pay support; (4) Hospital has no right of recovery against county for period pending determination of indigency; (5) Responsibility of other persons for care of patient pending determination of indigency depends on facts of individual case.
<a href="#">40-65</a>	Jan 29	COUNTIES. COUNTY REVENUE. COUNTY FUNDS. INTEREST.	Interest paid by a bank for courthouse bond sinking fund deposits must accrue to the fund itself and cannot be used as general revenue by the county.



<a href="#">41-65</a>	Feb 2		Opinion letter to the Honorable Robert Hoelscher
<a href="#">42-65</a>	Feb 11		Opinion letter to the Honorable Lloyd J. Baker
44-65	Apr 19		Withdrawn
<a href="#">45-65</a>	Feb 11		Opinion letter to Mr. Larry R. Gale
<a href="#">46-65</a>	Jan 26		Withdrawn
<a href="#">52-65</a>	Apr 19	BOARD OF REGENTS. QUASI-PUBLIC CORPORATION. SOVEREIGN IMMUNITY. STATE COLLEGE.	The use, occupancy and operation of dormitories for students not for profit by a state college is a governmental function of that institution and the Board of Regents of the said college is a quasi-public corporation and therefore the proper subject of sovereign immunity to liability in the same degree afforded the State.
<a href="#">54-65</a>	Feb 2		Opinion letter to the Honorable Alfred A. Speer
<a href="#">56-65</a>	Feb 2	CRIMINAL LAW. PUBLIC RECORDS.	Reports of criminal investigations and statements of suspects or defendants in criminal cases in the possession of the prosecuting attorney are not public records and need not be open for public inspection. However, a prosecuting attorney may, in his discretion, permit such inspection as he deems advisable.
58-65	May 7		Withdrawn
<a href="#">62-65</a>	Jan 19	LIQUOR CONTROL. BONDS.	Agents, assistants, deputies and inspectors of the Department of Liquor Control may be bonded under a blanket bond in the sum of \$5,000.00 for each agent, assistant, deputy and inspector.
<a href="#">64-65</a>	Apr 5	MILK PRODUCTS. HEALTH PURPOSES.	The phrase “not requiring refrigeration” as used in Section 196.932, RSMo. Cum. Supp. 1963, refers to milk products not requiring refrigeration for public health or sanitation purposes.
<a href="#">68-65</a>	Apr 6	CRIMINAL LAW. POOL HALLS. POOL HALLS – TABLES.	Participants in a “Jamboree,” a 20 game pool or billiard contest wherein participants receive prize money obtained from a \$10.00 entry fee which is distributed in proportion to the number of games won, are in violation of Section 563.390, RSMo 1959, which forbids playing pool for money.
<a href="#">69-65</a>	July 1		Opinion letter to Mr. James L. Paul
<a href="#">71-65</a>	Feb 5	SCHOOLS. SCHOOL DISTRICTS. STATE BOARD OF EDUCATION. SCHOOL ANNEXATION.	Section 165.300, RSMo Supp. 1963, (after July 1, 1965, renumbered as Section 162.441) does not require approval by the State Board of Education of a school district annexation where the districts adjoin.
<a href="#">72-65</a>	Feb 2	INCOME TAX. TAXATION.	There is no constitutional provision prohibiting the Legislature from paying interest on income tax refund claims which arose during the

		INTEREST.	year 1964 but which remain unpaid because of an insufficient appropriation.
<a href="#">73-65</a>	Feb 25		Opinion letter to the Honorable Peter H. Rea
<a href="#">78-65</a>	Apr 27	SCHOOLS. SCHOOL DISTRICTS. TUITION.	If a district does not maintain any high school or does not maintain high school facilities in which all high school students of the district can be educated, then as to any high school students which cannot be educated in the district's high school, the district has the duty and authority under Section 161.095, RSMo. Cum. Supp. 1963, to pay their tuition to attend a high school in the same or an adjoining county.
<a href="#">79-65</a>	July 22		Opinion letter to the Honorable James L. Paul
<a href="#">81-65</a>	Jan 25		Opinion letter to the Honorable Robert D. Scharz
<a href="#">82-65</a>	Mar 1	PHYSICIANS. HOSPITALS.	Physicians who accept professional staff appointments in Missouri hospitals and regularly practice medicine and surgery in those hospitals are maintaining an "appointed place to meet patients or receive calls within the limits of this state." Such physicians are required to have a Missouri license.
<a href="#">83-65</a>	June 8	COUNTY RECORDER OF DEEDS. SURVEYORS.	When an otherwise properly recordable instrument is presented and there are maps, plats, surveys, or other documents attached it is the duty of the recorder to record the instrument regardless of whether the maps, plats, surveys, or other documents are affixed with the seal and signature of a land surveyor.
<a href="#">84-65</a>	May 24	BOND ISSUES. PARK BOARD. STATE TREASURER. INTEREST.	Interest earned from deposit or investment of sinking funds established in connection with the State Park Revenue Bonds should be credited to said sinking funds and not to General Revenue.
<a href="#">85-65</a>	Mar 2	BONDS. SURETY BONDS. COUNTY COURT. OFFICERS. COUNTY SURVEYORS.	A County Court is authorized in its discretion to pay the bond premium for the Official Bond of the County Surveyor.
86-65	June 1		Withdrawn
<a href="#">89-65</a>	Feb 19	CITIES OF THE THIRD CLASS. CITIES, TOWNS, AND VILLAGES. ANNEXATIONS. ELECTIONS. CANDIDATES.	Previous residence in the territory annexed to the City of Macon is equivalent to residence in the City of Macon for the purpose of computing the period of residence required by Section 77.060, RSMo 1959, relating to candidates for councilman.

		COUNCILMEN. RESIDENTS.	
<a href="#">92-65</a>	Mar 29		Opinion letter to Mr. Leon F. Burton
<a href="#">95-65</a>			Opinion letter to Major General L. B. Adams
<a href="#">96-65</a>	June 30		Opinion letter to the Honorable Patrick J. Hickey
<a href="#">98-65</a>	Mar 17	SCHOOLS. SCHOOL DISTRICT. COUNTY SCHOOL BOARD. ELECTIONS.	Under Section 165.657, RSMo. Cum. Supp. 1963, an election of county board of education members must be held the first Tuesday in April, 1965, in the Springfield R-12 and all other school districts of Greene County and all districts of counties of the 2nd, 3rd, and 4 <sup>th</sup> class. The fact that members of the Springfield R-12 Board of Education are elected biennially in even-numbered years does not affect the right of the voters of the Springfield R-12 district to vote annually upon county board members.
<a href="#">100-65</a>	Feb 10		Opinion letter to Major John W. Howland
<a href="#">101-65</a>	Apr 6	DRIVER'S LICENSE. LICENSES. REVOCATION OF DRIVER'S LICENSE.	The enforcement of a suspension or revocation of a person's driving privilege made by the Director of Revenue under Chapter 302, RSMo 1963 Cum. Supp. is not automatically stayed by an appeal thereof. However, if the reviewing court grants a stay of the Director's order, the enforcement thereof is stayed during the appeal and resumes when a final decision is rendered, if the court, after review, upholds the action of the Director of Revenue.
<a href="#">103-65</a>	Mar 22		Opinion letter to the Honorable Charles H. Dickey, Jr.
104-65	Mar 22		Withdrawn
<a href="#">106-65</a>	Apr 16	TAXES – CREDIT UNIONS. TAXES – SAVINGS AND LOAN ASSOCIATIONS. REFUNDS – CREDIT UNIONS. REFUNDS – SAVINGS AND LOAN ASSOCIATIONS. CREDIT UNIONS – OVERPAYMENT OF TAXES. SAVINGS AND LOAN ASSOCIATIONS – OVERPAYMENT OF TAXES.	Credit may not be allowed and refund cannot be made to Credit Unions and Savings and Loan Associations for overpayment of taxes paid under Chapter 148. Refunds can be claimed by individual members of such institutions.

<a href="#">107-65</a>	May 26	TAXES – BANKS AND CREDIT INSTITUTIONS. REFUNDS – BANKS AND CREDIT INSTITUTIONS. BANKS – OVERPAYMENT OF TAXES. CREDIT INSTITUTIONS – OVERPAYMENT OF TAXES.	Credit for overpayment of taxes paid under Chapter 148 by banks and credit institutions may be allowed only upon examination of returns for the current year. Refund of such overpayment may be claimed within two years of payment.
<a href="#">108-65</a>	Mar 1		Opinion letter to Reuben R. Rhoades, D.D.S.
<a href="#">109-65</a>	Apr 19	DEPUTY SECRETARY OF STATE. FACSIMILE SIGNATURE. SECRETARY OF STATE. SIGNATURE.	Secretary of State may affix his printed facsimile signature to documents required to be attested to or issued by his office, if it is followed by the handwritten signature of Deputy Secretary of State as designated by the Secretary of State.
113-65	June 18		Withdrawn
<a href="#">114-65</a>	Mar 30		Opinion letter to the Honorable Clifford A. Falzone
<a href="#">115-65</a>	Apr 13		Opinion letter to the Honorable James L. Paul
<a href="#">117-65</a>	May 24		Opinion letter to the Honorable Harold L. Fridkin
<a href="#">118-65</a>	Mar 5	SEWER DISTRICT BONDS. METROPOLITAN SEWER DISTRICT BONDS. SECURITY. STATE DEPOSITORIES. STATE FUNDS. BANKS.	Bonds of Metropolitan Sewer District not eligible as security for state deposits in banks.
<a href="#">119-65</a>	May 10		Opinion letter to the Honorable Bill Crigler
<a href="#">120-65</a>	Feb 25		Opinion letter to the Honorable William D. Kimme
121-65	Mar 25		Withdrawn
124-65	Mar 1		Withdrawn
<a href="#">125-65</a>			Opinion letter to Mr. V. H. Simon
<a href="#">127-65</a>	Mar 8		Opinion letter to the Honorable Robert D. Scharz
<a href="#">129-65</a>	Aug 19	SCHOOLS.	1. A county superintendent who becomes a lawfully qualified public

		COUNTY SUPERINTENDENTS. TEACHERS. OFFICERS. INCOMPATIBLE OFFICES.	school teacher vacates his office regardless of the brevity of service as a teacher; 2. A county superintendent who acted as a public school teacher without executing a written contract as required by Sections 163.080 and 432.070, RSMo 1959, did not have a lawful right to the position of teacher. Since legally she never held the position of teacher, there was no dual capacity and the doctrine prohibiting holding of incompatible public positions does not operate to vacate the county superintendent's office.
<a href="#">130-65</a>	Mar 5		Opinion letter to the Honorable Charles B. Faulkner
<a href="#">131-65</a>	May 27		Opinion letter to the Honorable Patricia L. Webber
<a href="#">133-65</a>	Aug 4	SCHOOL DISTRICTS. SCHOOL TEACHERS. RETIREMENT AGE. SOCIAL SECURITY.	A teacher in the public school system of Missouri, who was eligible for state teacher retirement benefits under the Public School Retirement system of Missouri, upon reaching age 70, is also covered by Federal Social Security after reaching age 70 when and if he occupies a position different from any position he occupied prior to age 70 which was covered by such state teacher-retirement system.
<a href="#">136-65</a>	May 10	MOTOR VEHICLES. LOCAL COMMERCIAL MOTOR VEHICLES. COMMERCIAL MOTOR VEHICLES.	(l) An owner or a vehicle registered as a non-farm local commercial motor vehicle is in violation of Section 301.010 (10), RSMo, if it is found at a point beyond the twenty-five miles from the municipality of operation but within twenty-five miles from the municipality of registration; (2) There is no requirement in Section 301.020, RSMo, that in registering a local commercial vehicle, the owner designate the municipality from which to compute the twenty-five mile radius, and; (3) There is no requirement in the statutes that the municipality designated on the side of the vehicle in compliance with Section 301.330, RSMo, be the same as the municipality from which the vehicle is registered.
<a href="#">137-65</a>	Apr 19		Opinion letter to the Honorable Paul M. Berra
<a href="#">139-65</a>	May 24		Opinion letter to the Honorable Warren E. Hearnese
<a href="#">140-65</a>	Mar 29		Opinion letter to Dr. H. M. Hardwicke
<a href="#">142-65</a>	Apr 28		Opinion letter to the Honorable E. J. Cantrell
<a href="#">149-65</a>	Mar 22		Opinion letter to the Honorable John B. McMullin
<a href="#">150-65</a>	May 27	SCHOOLS. SCHOOL ELECTIONS. SCHOOL ANNEXATION ELECTIONS. TIE VOTE.	In a school annexation election resulting in a tie vote a second election is not permitted for two years under Section 165.300 RSMo. Supp. 1963. Because Section 165.300 is repealed, effective July 1, 1965, and replaced by 162.441 RSMo. Supp. 1963 Appendix, another election is permitted after July 1, 1965, because a majority of votes cast at the

			former election was not against annexation.
<a href="#">152-65</a>	Nov 4	OFFICERS. COUNTY OFFICERS. COUNTY CLERKS. COUNTY HIGHWAY ENGINEERS. HIGHWAYS. COUNTY ROAD FUNDS.	<p>A county clerk or county treasurer of a third or fourth class county may act in the capacity of and receive additional compensation from county revenue funds for: (A) Serving as a duly appointed assistant highway engineer, (B) Clerical or stenographic assistant to the county superintendent of schools, (C) Stenographic or clerical assistant to the prosecuting attorney, (D) Bookkeeper and stenographic assistant to the magistrate, (E) Clerical assistant to the highway engineer.</p> <p>The county court of a third or fourth class county may, pursuant to Section 61.610, create the office of County Highway Engineer and appoint the county clerk to fill that office; however the term “ex-officio highway engineer” would be improper terminology for designating the title of such officer.</p> <p>County clerks of third and fourth class counties are not entitled to compensation in addition to statutory amounts for the office of county clerk for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by the County Aid Road Trust Fund.</p> <p>A county judge may not serve as extra help in the office of the county highway engineer or perform labor or other service in connection with county roads or bridges.</p>
<a href="#">153-65</a>	Mar 30		Opinion letter to the Honorable Jack Keane
<a href="#">154-65</a>	June 22	RECORDERS. ACKNOWLEDGMENTS. PHOTOCOPIES.	<p>Recorder must accept for recordation all instruments that are defined by Sec. 59.330, V.A.M.S. and in proper form duly acknowledged. Instrument whose acknowledgments are reproduced are not acceptable for filing.</p> <p>Photocopies or reproduction of acknowledgments are not acceptable on instruments offered for recordation.</p> <p>Photocopies of acknowledgments are not acceptable for recordation even though a notary seal is affixed.</p>
<a href="#">156-65</a>	Apr 7		Opinion letter to Mr. Clifford L. Summers
<a href="#">157-65</a>	Aug 4	SCHOOLS. ANNEXATION. ELECTIONS. TIME.	<p>1. Where more than one petition to call an annexation election is presented to a school board, the board has a duty to order an election upon the first valid petition before the remaining petitions are acted upon;</p> <p>2. Where an annexation election has been held and an annexation offered, the receiving district must act upon the annexation within a reasonable time. A delay of nine months in acting upon an annexation offer is not unreasonable as a matter of law, but depending on the circumstances of each case, may be considered unreasonable by a court.</p>

158-65	Mar 25		Withdrawn
<a href="#">163-65</a>	Mar 30	AUDITOR. BONDS.	The state is authorized to purchase a blanket bond to cover all examiners of the Office of State Auditor, if such blanket bond covers each examiner individually in the sum of \$10,000.00.
<a href="#">164-65</a>	May 12		Opinion letter to the Honorable Jasper M. Brancato
<a href="#">166-65</a>	May 24		Opinion letter to the Honorable Gerald Kiser
<a href="#">168-65</a>	Apr 5		Opinion letter to the Honorable James. T. Riley
<a href="#">170-65</a>	Apr 28	COUNTY COUNSELOR. ATTORNEYS. SPECIAL ROAD AND BRIDGE FUND.	Special Road and Bridge Fund of Jackson County cannot be used to pay salary of an Assistance County Counselor of Jackson County.
<a href="#">174-65</a>	June 14		Opinion letter to the Honorable Ralph E. Smith
<a href="#">176-65</a>	Apr 19		Opinion letter to the Honorable Cloy E. Whitney
<a href="#">179-65</a>	Aug 16		Opinion letter to the Honorable Kenneth R. Babbitt
<a href="#">180-65</a>	Apr 12		Opinion letter to Mr. Thomas C. Gilstrap
<a href="#">182-65</a>	Apr 30		Opinion letter to the Honorable John E. Downs
<a href="#">183-65</a>	June 9		Opinion letter to the Honorable James R. Hall
<a href="#">185-65</a>	Apr 19		Opinion letter to Dr. George A. Ulett
<a href="#">186-65</a>	Aug 6	MUNICIPAL CORPORATIONS. SECOND CLASS COUNTIES. METROPOLITAN PLANNING COMMISSIONS. CONTRACTS.	The City of St. Joseph and the County of Buchanan are authorized to create a Metropolitan Planning and Zoning Commission. Under the contract which has been executed by these two political entities, whereby this Planning agency has been created, the agency is authorized to enter into appropriate contracts with State or Federal agencies without securing prior approval from the City of St. Joseph or the County of Buchanan.
<a href="#">190-65</a>	Sept 28		Opinion letter to the Honorable John C. Vaughn
192-65	July 13		WITHDRAWN
<a href="#">193-65</a>	Aug 5	OFFICERS. SCHOOLS. BOARDS. CITIES, TOWNS, AND VILLAGES. CONFLICT OF INTEREST. PUBLIC OFFICERS.	A school board director is prohibited from participating in any contract or transaction in which he has a direct or indirect interest including the ownership of stock in a corporation doing business with the school board.  A school board of directors may deposit funds of the school district in a bank in which the president of the school board has such a small amount of stock that such ownership will not influence his judgment in behalf of the public interest and in which he is neither an officer or

			a director and where there is no bad faith or fraud.
<a href="#">196-65</a>	June 1	PUBLIC ADMINISTRATORS. BONDS. OFFICIAL BONDS. OFFICERS. OFFICERS HOLDING OVER.	(1) Public Administrator-elect must give bond before he is qualified to hold office. (2) Failure to give bond within time prescribed does not automatically vacate the office but may be ground to declare office vacant by legal procedure. (3) Until Public Administrator-elect or another becomes qualified to hold the office, the incumbent Public Administrator continues to have the right to the office.
<a href="#">197-65</a>	May 6		Opinion letter to the Honorable Harry E. Hatcher
<a href="#">199-65</a>	June 9		Opinion letter to the Honorable Frank Conley
<a href="#">200-65</a>	July 15	INSURANCE. CORPORATIONS.	A life insurance company cannot accept the provisions of the General and Business Corporations Act.
<a href="#">201-65</a>	May 24	WITNESSES. PROSECUTING WITNESSES. PROSECUTING ATTORNEYS. NOLLE PROSEQUI.	A prosecuting witness cannot nolle prosequi a criminal case. Same is the exclusive prerogative of the prosecuting attorney.
<a href="#">202-65</a>	May 24	CONSTITUTIONAL LAW. GOVERNOR. VETO.	In any bill containing an emergency clause, the Governor is powerless to veto the emergency clause only.
<a href="#">203-65</a>	May 13	JAILS AND JAILERS. PRISONERS. COUNTIES. CRIMINAL COSTS.	Expense of jailkeeper of third and fourth class county for boarding prisoners from another county is limited to actual and necessary costs.  County committing prisoner is not legally liable for damage caused by prisoner to the property of the county where the prisoner is held in jail.
204-65	Apr 21		Withdrawn
<a href="#">207-65</a>	Oct 5	SCHOOLS. SCHOOL DISTRICTS. SCHOOL BOARDS.	School boards have the authority to employ personnel for the purpose of providing for the safety and discipline of pupils while on streets proximate to the school premises during times proximate to school activities.
<a href="#">212-65</a>	Sept 14	CITIES. PLANNING. ZONING. HISTORICAL AREA.	The City of St. Charles has the power under Chapter 89, RSMo 1959, to enact a zoning ordinance providing for an historical area.
<a href="#">213-65</a>	Aug 31	DRIVER'S LICENSE. CHAUFFEUR'S LICENSE.	When a person has both a chauffeur's license as well as an operator's license and receives the necessary points under the Point System for



		MOTOR VEHICLES. LICENSES.	revocation or suspension of his operating privileges, then both such licenses are revoked or suspended.
<a href="#">216-65</a>	May 7	GOVERNOR – DISAPPROVAL OF DEPOSITARIES. AUDITOR – DISAPPROVAL OF DEPOSITARIES. TREASURER – SELECTION OF DEPOSITARIES. DEPOSITARIES, DEMAND – DESIGNATION. CONSTITUTION – SEPARATION OF POWERS.	(1) Disapproval by Governor or Auditor of depositary selection is a veto. (2) Treasurer cannot be compelled by judicial process to select depositaries. (3) Existing depositaries remain lawful pending further designations.
<a href="#">217-65</a>	June 22	AUTOPSY. CORONERS. PHYSICIAN.	The 1961 amendment to Section 194.115, V.A.M.S., does not authorize a coroner of a Class III county to order an autopsy performed without the consent of the next of kin or without having been so directed by a coroner's jury.
218-65	July 13		Withdrawn
219-65	Nov 8		Withdrawn
<a href="#">220-65</a>	June 22		Opinion letter to the Honorable Richard J. Rabbitt
<a href="#">226-65</a>	July 21	AGRICULTURE – SWINE BUYING STATIONS. LIVESTOCK MARKETING LAW – SWINE. BUYING STATIONS.	Swine Buying Stations are livestock markets.
<a href="#">228-65</a>	June 7	FEES AND SALARIES. SHERIFFS.	In a county of the second class with less than one hundred thousand inhabitants a sheriff who receives a commission for a partition sale under Section 528.610, RSMo 1959, must collect and pay such commission to the county treasurer as directed by Section 57.380, RSMo 1959, minus that amount he may retain under Section 57.340, RSMo 1959.
<a href="#">230-65</a>	May 25	CONSTITUTIONAL AMENDMENT.	Ballot title for House Joint Resolution No. 1.
<a href="#">231-65</a>	May 25	CONSTITUTIONAL AMENDMENT.	Ballot title for House Joint Resolution No. 3.

<a href="#">234-65</a>	Oct 18	ACKNOWLEDGEMENTS. LAND SURVEYORS.	A recorder of deeds is not authorized to refuse to record a “plat” or survey of real estate on the grounds that the signature of the registered land surveyor who has prepared the document has not been acknowledged.
<a href="#">235-65</a>	June 7		Opinion letter to the Honorable Allen S. Parish
<a href="#">237-65</a>	Oct 26	COMMERCIAL VEHICLES. CAMPERS.	The state collector of revenue has the power to classify as commercial motor vehicles, “campers” which are regularly used to haul freight, merchandise, or more than eight passengers, as well as motor vehicles that were intended and contemplated by the manufacturer to regularly carry freight, merchandise or more than eight passengers.
<a href="#">239-65</a>	June 1	INSURANCE.	Articles of Incorporation of Founders Security Life Insurance Company.
<a href="#">240-65</a>	June 1	INSURANCE.	Articles of Incorporation of Central Investors Life Insurance Company
<a href="#">241-65</a>	Oct 1		Opinion letter to the Honorable Earl A. Bollinger
<a href="#">242-65</a>	July 1		Opinion letter to the Honorable John A. Callow
<a href="#">243-65</a>	June 22		Opinion letter to the Honorable Philip G. Hess
<a href="#">245-65</a>	Aug 5	COUNTY COLLECTOR. SURETY BOND PREMIUMS. NON-LIABILITY OF COUNTY.	Cooper County, Missouri, is not liable for payment of premiums on surety bond of Collector of Revenue of said County for years 1960 through 1964.
<a href="#">246-65</a>	June 3	CONSTITUTIONAL AMENDMENT.	Ballot title for House Joint Resolution No. 11.
<a href="#">247-65</a>	June 22	PROBATE COURT. STATE MENTAL HOSPITALS. INSANE PERSONS.	With respect to the commitment and hospitalization of the mentally ill, Sections 202.780 to 202.870, RSMo: (1) The probate court may order that commitment for hospitalization pursuant to Section 202.807 be to the Division of Mental Diseases; (2) The Division has authority under Section 202.823 to transfer an involuntary patient from one State hospital to another State hospital without the concurrence of the court ordering the hospitalization.
249-65	Aug 6		Withdrawn
<a href="#">250-65</a>	June 29		Opinion letter to Mr. Thomas L. David
<a href="#">252-65</a>	Nov 4		Opinion letter to the Honorable John J. Johnson
<a href="#">253-65</a>	Sept 22	COUNTY COURTS. ROADS AND STREETS. ROADS.	The county court has no authority under Chapter 228, RSMo, to open as a county road a proposed street which is entirely within the boundaries of a fourth class city and is not part of a continuous

		STREETS. ROADS AND BRIDGES.	county road.
<a href="#">256-65</a>	Dec 21	COUNTY OPTION DUMPING GROUND LAW. COUNTY OPTION DUMPING GROUND LAW - NOTICE. COUNTY OPTION DUMPING GROUND LAW - HEARING.	If published as described in Section 64.550, RSMo 1959, in at least one newspaper having general circulation within the county, and if posted fifteen days in advance of the hearing, in at least four conspicuous places in each township. The county court must make a reasonable effort to hear arguments and evidence, pro and con, on the adoption the County Dumping Ground ordinance. The county court, in its discretion exercised in a reasonable manner may control and limit such presentation.
<a href="#">258-65</a>	Aug 31		Opinion letter to the Honorable Paul McGhee
<a href="#">260-65</a>	June 22	INSURANCE.	Articles of Incorporation of National Pilot Life Insurance Company.
<a href="#">262-65</a>	Sept 28		Opinion letter to the Honorable Alfred A. Speer
<a href="#">267-65</a>	June 29	INSURANCE.	Articles of Incorporation of Central Investors Life Insurance Company.
<a href="#">268-65</a>	June 29	INSURANCE.	Articles of Incorporation of Founders Security Life Insurance Company.
<a href="#">269-65</a>	Sept 28	PROBATE COURTS. WITNESSES. MENTAL ILL.	Section 202.807 RSMo 1959, in respect to judicial proceedings for hospitalization of the mentally ill, does not require that the physician be physically present at the hearing. Evidence in affidavit form meets the requirements of the statute if all parties to whom notice is required to be given expressly agree and the Court concurs. Without complete agreement of the parties and the Court, the evidence of the physician must be adduced by deposition or by his oral testimony at the hearing.
<a href="#">275-65</a>	June 29	CONSTITUTIONAL AMENDMENT.	Ballot title for Conference Committee Substitute for House Joint Resolution No. 48
<a href="#">276-65</a>	Oct 29	AGRICULTURE. ECONOMIC POISONS.	Disinfectants and antiseptics for use on the body of living animals for medicinal purposes are not economic poisons.
<a href="#">278-65</a>	July 21		Opinion letter to Mr. Francis O'Brien
280-65	Sept 29		Withdrawn
<a href="#">285-65</a>	Sept 14	STATE RECORDS ACT. UNIVERSITY OF MISSOURI. PUBLIC RECORDS.	House Bill No. 294 does not apply to the University of Missouri.
<a href="#">286-65</a>	July 15	CONSTITUTIONAL AMENDMENT.	Ballot title for House Joint Resolution No. 26

<a href="#">287-65</a>	Sept 29	NOTARY PUBLIC.	County Clerk to certify copies of the Notary Public's appointment under Senate Bill No. 259
288-65	Oct 26		Withdrawn
<a href="#">289-65</a>	Oct 6		Opinion letter to the Honorable Don E. Burrell
291-65	Aug 4		Withdrawn
<a href="#">292-65</a>	Oct 21	SCHOOLS. PUBLIC SCHOOL RETIREMENT SYSTEM. RETIREMENT. PENSIONS.	1.) A member of a teachers' retirement system of this State who meets the requirements for retirement contained in the statutes particularly applicable to that system, i.e., as though Section 169.570(1), RSMo 1959, had never been enacted, is eligible to receive a retirement allowance from that system although employed in a position covered by one of the other systems; 2.) Conversely, a member of a teachers' retirement system of this State who cannot qualify for retirement without reliance upon the additional rights granted by Section 169.570(1) is not eligible for a retirement allowance under the earlier system under which he was employed until, and only if, he becomes eligible for service retirement under the system in which he is last employed (except those having previously retired on disability become eligible upon reaching retirement age.)
<a href="#">293-65</a>	July 14	CONSTITUTIONAL AMENDMENT.	Ballot title for House Committee Substitute for House Joint Resolutions 5 and 15
<a href="#">295-65</a>	July 14	INSURANCE.	Articles of Incorporation of the Congressional Life Insurance Company
<a href="#">296-65</a>	Aug 24		Opinion letter to the Honorable Richard E. Snider
<a href="#">297-65</a>	July 21	CONSTITUTIONAL AMENDMENT.	Ballot title for Senate Joint Resolution No. 10
<a href="#">300-65</a>	Nov 4		Opinion letter to the Honorable Glennon T. Moran
<a href="#">301-65</a>	Aug 16	MORTGAGES. CHATTEL MORTGAGES. RECORDERS. COUNTY RECORDERS. UNIFORM COMMERCIAL CODE. FEES, COMPENSATION AND SALARIES. FEES.	A recorder of deeds should accept for filing or recording a chattel mortgage on motor vehicles executed prior to July 1, 1965, when presented for filing or recording after such date if the fees payable for filing or recording such chattel mortgage prior to July 1, 1965, are tendered for such filing or recording.
<a href="#">302-65</a>	July 14		Opinion letter to the Honorable Warren E. Hearnese
<a href="#">303-65</a>	Sept 28		Opinion letter to the Honorable Don D. Davis
<a href="#">_____</a>			

<a href="#">304-65</a>	Nov 9	COUNTY COURTS. LEASES. COUNTY CONTRACTS. CONSTITUTIONAL LAW. BONDS. PUBLIC CONTRACTS.	County courts may execute leases for several years providing current and surplus funds on hand will be adequate to pay their obligations under the lease. Such lease could be funded by bonds if authorized by popular vote under Section 26(b) Article VI, Missouri Constitution 1945. County courts may execute a lease for multiple years that would be binding on succeeding courts, providing the contract is not for an unreasonable term or is in bad faith or fraudulent.
<a href="#">305-65</a>	Aug 16	MORTGAGES. CHATTEL MORTGAGES. RECORDERS. COUNTY RECORDERS. UNIFORM COMMERCIAL CODE. FEES, COMPENSATION AND SALARIES. FEES.	A recorder of deeds should accept for filing or recording a chattel mortgage on motor vehicles executed prior to July 1, 1965, when presented for filing or recording after such date if the fees payable for filing or recording such chattel mortgage prior to July 1, 1965, are tendered for such filing or recording.
<a href="#">307-65</a>	Aug 16	INSURANCE.	Acceptance of regular life insurance law by New Empire Life Insurance Company, a stipulated premium plan company.
<a href="#">309-65</a>	Aug 24		Opinion letter to Mr. William E. Towell
<a href="#">310-65</a>	Aug 11		Opinion letter to Mrs. Olean Barton
<a href="#">313-65</a>	Oct 14		Opinion letter to the Honorable Thomas A. David
315-65	Sept 29		Withdrawn
<a href="#">318-65</a>	Sept 9		Opinion letter to the Honorable Don E. Burrell
<a href="#">321-65</a>	Nov 24	STATUTE OF LIMITATIONS. WORKMEN'S COMPENSATION ACT.	Time for filing claim extended to one year after the filing of report of injury by employer, under Sections 287.430 and 287.440, Laws of 1965.
<a href="#">322-65</a>	Sept 17	JUDGES. CIRCUIT JUDGES. COURTS. OFFICERS. COMPENSATION OF OFFICERS. COUNTY COURTS.	House Bill 390, 73rd General Assembly (Section 478.013 RSMo.) applies to the Circuit Judge of Cole County and provides that his salary shall be Sixteen-Thousand dollars per annum payable out of the state treasury and if the county court should so order, an additional Three-Thousand dollars per annum to be paid by Cole County.
<a href="#">324-65</a>	Dec 30	ELECTION COMMISSIONERS. BOARDS. ELECTORS. NAMES.	The Board of Election Commissioners has the responsibility to determine the qualification of voters . Where an elector changes his name, he is entitled to reregister under such name if the change of name was bona fide and not fraudulent in its purpose. Where an issue of good faith arises in a change of name, the Board, after

		ELECTIONS.	hearing all the evidence, should determine if such change of name is bona fide. If the parties act in good faith with full disclosure of the facts, there would be no violation of Section 129.680, RSMo 1959.
<a href="#">325-65</a>	Aug 16	INSURANCE.	Articles of Incorporation of Empire Security Life Insurance Company
<a href="#">328-65</a>	Aug 20		Opinion letter to the Honorable John T. Russell
<a href="#">331-65</a>	Dec 30	LEVEE DISTRICTS. COUNTY COURTS. BOARD OF EQUALIZATION.	1. County Board of Equalization cannot change benefit assessment for levee. 2. Benefit assessment for maintenance tax may be changed under Section 243.063.
<a href="#">332-65</a>	Aug 31		Opinion letter to the Honorable Harold L. Fridkin
<a href="#">333-65</a>	Nov 23		Opinion letter to the Honorable Alden S. Lance
<a href="#">334-65</a>	Aug 27	CONSTITUTIONAL LAW. GENERAL ASSEMBLY. ELECTIONS. ELECTION DISTRICTS.	General Assembly can reapportion House of Representatives but cannot delegate such authority to commissions. House of Representatives of any size may be created by Constitutional Amendments.
<a href="#">335-65</a>	Oct 7		Opinion letter to Mr. Glennon T. Moran
<a href="#">339-65</a>	Oct 21	COUNTY CLERKS. COUNTY CLERKS SALARIES. COUNTY OFFICERS. SALARIES OF COUNTY CLERKS.	Under Senate Bill 91 (Section 51.300 V.A.M.S.) the change of salaries of County Clerks in third class counties is effective January 1, 1967.
<a href="#">342-65</a>	Nov 24		Opinion letter to the Honorable Don E. Burrell
<a href="#">343-65</a>	Sept 9		Opinion letter to Mr. Eugene P. Walsh
344-65	Sept 28		Withdrawn
<a href="#">345-65</a>	Oct 26		Opinion letter to the Honorable John L. Woodward
<a href="#">346-65</a>	Dec 21		Opinion letter to the Honorable Dan Bollow
<a href="#">347-65</a>	Sept 22	PUBLIC ADMINISTRATOR. PROBATE COURT.	With respect to the qualifications of public administrator: (1) Article VII, Section 8, of the Constitution of 1945 requiring that the public administrator be a citizen of the United States, and a resident of this state one year next preceding his election. (2) The provisions of Section 473.117, paragraph 1, RSMo 1959, relative to persons disqualified from administering estates, and Section 475.055, paragraph 2, RSMo 1959, relative to the qualifications of guardians apply to the office of public administrator.
<a href="#">348-65</a>	Sept 8		Opinion letter to the Honorable Haskell Holman

<a href="#">351-65</a>	Dec 2	HOSPITAL DISTRICTS. TAXATION.	A hospital district, duly organized has authority to levy taxes under the provisions of Chapter 206 before a hospital is actually constructed and operating. Such funds can be used to buy land for the hospital site, construct the hospital and/or other purposes set out in Section 206.110 RSMo., Cum. Supp. 1963.
<a href="#">352-65</a>	Nov 23		Opinion letter to the Honorable Frank C. Mazzuca
<a href="#">353-65</a>	Nov 24		Opinion letter to the Honorable James L. Paul
354-65	Nov 23		Withdrawn
<a href="#">355-65</a>	Nov 9		Opinion letter to Mr. Eugene P. Walsh
<a href="#">356-65</a>	Sept 22		Opinion letter to Mrs. Olean Barton
<a href="#">358-65</a>	Sept 22		Opinion letter to the Honorable Robert B. Paden
<a href="#">359-65</a>	Sept 22	RIVER BEDS. COUNTY LANDS.	Abandoned river bed lands belonging to a county of this state may be sold at public or private sale and without a survey.
<a href="#">360-65</a>	Oct 20	CONSTITUTIONAL LAW. GOVERNOR. EXTRAORDINARY SESSION. LEGISLATURE. GENERAL ASSEMBLY. REAPPORTIONMENT.	Legislature at a special session can act only upon subject within scope of Governor's proclamation.
<a href="#">365-65</a>	Nov 19	SHERIFFS. COUNTY CLERKS AND DEPUTIES. PROBATE CLERKS. COUNTY HIGHWAY ENGINEERS. COUNTY OFFICERS. SALARIES.	(1) Increase mileage allowed sheriff under Senate Bill No. 87, effective October 13, 1965. (2) Increase in amount available under Senate Bill 89, for deputy clerks in third class counties, effective October 13, 1965. (3) increase in amount available under House Bill No. 71, for probate clerks effective October 13, 1965. (4) Increase in salary for county highway engineers under House Bill No. 473, does not apply to present term of office. (5) Salary increase under Senate Bill No. 88, for county clerks does not apply to present term of office. (6) Increase in amount available for deputy county clerks in fourth class counties under Senate Bill No. 88, effective October 13, 1965. (7) Increase in compensation for county clerks, except in second class counties under Senate Bill No. 90, effective October 13, 1965. (8) Increase in compensation under Senate Bill No. 90, prorated on monthly basis.
<a href="#">366-65</a>	Nov 9	COUNTY FIRE DISTRICTS. FIREMEN. RETIREMENT.	House Bill No. 356, 73rd General Assembly (Section 321.220 as amended) Subsection 15 authorizing a pensioning program for firemen in Fire Protection Districts in counties of the first class is constitutional. House Joint Resolution Nos. 5 and 15 would allay any

		RETIREMENT INSURANCE. CONSTITUTIONAL LAW. SPECIAL FUNDS. MUNICIPAL CORPORATIONS.	questions of constitutionality of the pensioning program for firemen in Fire Protection Districts in counties of the first class. Under House Bill No. 52, 73rd General Assembly (Section 321.240 V.A.M.S. August 1965 Pamphlet) the Board in its discretion may provide for a program of pensions through an insurance company except that a mutual company having an unlimited assessment liability may not be employed. The special fund raised for this purpose by taxation can only be utilized to provide a pension program.
<a href="#">368-65</a>	Dec 2	APPROPRIATION. CONSTITUTION. GENERAL ASSEMBLY. LEGISLATURE. LIQUOR.	Monies collected under House Bill No. 292, 73rd General Assembly, enacted as Section 311.328 (5), V.A.M.S. August 1965 Pamphlet, should be paid into the treasury as general revenue. It is our further opinion that Section 4.645, Conference Committee Substitute for House Bill No. 4, 73rd General Assembly, is not unconstitutional.
<a href="#">369-65</a>	Oct 8	SCHOOLS. NEWSPAPERS.	Publication of financial report, Section 165.111, must be in a newspaper meeting requirements of Section 493.050.
<a href="#">371-65</a>	Nov 8	TAXATION. MERCHANT'S LICENSE. MANUFACTURER'S LICENSE.	Interest and penalty on delinquent merchant's and manufacturer's license.
<a href="#">375-65</a>	Oct 11		Opinion letter to Senator Raymond Hopfinger
<a href="#">376-65</a>	Oct 6		Opinion letter to the Honorable Philip G. Hess
<a href="#">377-65</a>	Dec 14	CRIMINAL LAW. ABANDONMENT. CHILD ABANDONMENT. FAILURE TO SUPPORT. CHILDREN.	Abandonment and failure to support child prior to October 13, 1965, misdemeanor. Abandonment after October 13, 1965, constitutes felony.
<a href="#">383-65</a>	Oct 29		Opinion letter to the Honorable Charles G. Hyler
<a href="#">384-65</a>	Nov 9	CIRCUIT CLERK-RECORDER. COUNTY OFFICERS. COMPENSATION.	Salary increase under Senate Bill No. 267 not applicable during present term of office.
<a href="#">388-65</a>	Nov 8	COUNTIES. CIRCUIT JUDGES. SALARIES. CONSTITUTIONAL LAW.	Where statutes are passed at the same legislative session and are in pari materia, the last statute signed by the Governor is considered as being the law where there are conflicting provisions. Where county courts so order, the circuit judge shall receive an additional \$3,000 per annum, <u>each county contributing in equal amounts</u> .
<a href="#">390-65</a>	Nov 8	COUNTIES. CIRCUIT JUDGES.	Where statutes are passed at the same legislative session and are in pari materia, the last statute signed by the Governor is considered as



		SALARIES. CONSTITUTIONAL LAW.	being the law where there are conflicting provisions. Where county courts so order, the circuit judge shall receive an additional \$3,000 per annum, <u>each county contributing in equal amounts</u> .
394-65	Dec 30		Withdrawn
<a href="#">396-65</a>	Oct 29	INSURANCE.	Articles of Incorporation of Modern Old Line Life Insurance Company.
<a href="#">397-65</a>	Oct 29	GENERAL ASSEMBLY. EXTRAORDINARY SESSION LEGISLATURE. EXTRAORDINARY SESSION EXTRAORDINARY SESSION.	Legislature at a special session can act on specific matters not suggested by Governor if such specific matters are within subject of Governor's proclamation.
<a href="#">404-65</a>	Nov 24		Opinion letter to the Honorable William W. Hoertel
<a href="#">406-65</a>	Nov 24		Opinion letter to the Honorable Fielding Potashnick
<a href="#">416-65</a>	Dec 17	MOTOR VEHICLES. TIRES. STUDS.	Pneumatic tires made of rubber, nylon, or some similar synthetic, studded with metal inserts as described herein, are not prohibited by statute in the State of Missouri.
<a href="#">419-65</a>	Dec 29		Opinion letter to the Honorable Earl R. Blackwell
<a href="#">421-65</a>	Dec 30		Opinion letter to the Honorable William Fickle
<a href="#">433-65</a>	Dec 2	PROSECUTING ATTORNEY. COUNTY OFFICERS. SALARIES. BUDGET LAW.	The compensation provided for by Senate Bill No. 355 enacted by the 73rd General Assembly applies during the present term of office.
<a href="#">444-65</a>	Dec 14	MOTOR VEHICLES. MOTOR VEHICLE REGISTRATION. LICENSES. STATUTES. CITIES, TOWNS AND VILLAGES.	Vehicles leased by a city and used by the police department of the city must be registered and licensed upon application of the person, firm, corporation or association holding legal title to such vehicles unless such vehicles are the subject of an agreement of lease with the right of purchase upon performance of conditions stated in an agreement for lease.
<a href="#">446-65</a>	Nov 22	CONSTITUTIONAL AMENDMENT.	Ballot Title for Conference Committee Substitute for House Substitute No. 4 for House Committee Substitute for House Joint Resolution No. 1 – First Extra Session 73rd General Assembly.
<a href="#">469-65</a>	Mar 29		Opinion letter to Mr. Sargent Shriver
<a href="#">471-65</a>	Dec 21	STATE TREASURER. STATE DEPOSITORIES.	The state depository contract provides for time deposits, open account for which the state is paid interest on an escalating scale.

		BANKS. INTEREST. NOTICE.	Banks cannot return deposits unless the banks terminate the contract on 30 days written notice. The 30 days begin to run when the notice is received by the State Treasurer.
<a href="#">476-65</a>	Dec 16		Opinion letter to the Honorable Thomas David
<a href="#">477-65</a>	Dec 22		Opinion letter to the Honorable Thomas A. David

TAXATION - EXEMPTIONS:  
LIENS:  
ASSESSMENTS:  
LEVY:  
UNITED STATES PROPERTY:

If state taxes have become a lien on Missouri real property during the time of private ownership, this lien continues to be an encumbrance on the property after acquisition by the Small Business Administration, but the lien is not enforceable as long as the Federal Government holds title. Also, the property is not subject to new levy and assessment for taxes while title is in the Federal Government.

OPINION NO. 5 (1965)  
OPINION NO. 91 (1964)

May 24, 1965

Honorable James T. Riley  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri



Dear Mr. Riley:

This is in answer to your request for an opinion of this office, as follows:

"We request your opinion as to whether or not real estate situate in the State of Missouri and acquired by the Small Business Administration through foreclosure is subject to state and county general real estate taxes.

"Real estate situate in Jefferson City was owned by Rite-Way Poultry, Inc., a Missouri corporation. The 1963 general real estate taxes were assessed against the property as of January 1, 1963.

"On August 8, 1963, a deed of trust executed by Rite-Way Poultry, Inc. in favor of the Small Business Administration was foreclosed. The Trustee's Deed conveyed the property to the Small Business Administration.

"I am attaching copies of two letters received from that government agency.

"The 1963 taxes were levied and assessed at the time the property was owned by the private Missouri corporation. Do these taxes remain a lien on the property?

"Is the property now subject to levy and assessment for 1964 general taxes?"

The deed of trust and foreclosure were made under the provisions of the Small Business Act, 15 U.S.C.A., Chapter 14A. In U.S. v. Christensen, D.C. Mont. 1963, 218 F.Supp. 722, 729, the court says: "The Small Business Administration is an agency of the United States. 15 U.S.C.A. Section 633." 15 U.S.C.A. Section 634(b) states that the Administrator may acquire real property when "necessary or appropriate to the conduct of the activities authorized in sections 636(a) and 636(b) of this title." 15 U.S.C.A. Section 636 empowers the Administrator to make loans and subsection (a) (7) says that: "All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment." Thus, when the Administrator foreclosed the deed of trust title was in the United States and not subject to state taxes unless Congress so allows. Rohr Aircraft Corp. v. San Diego County, 362 U.S. 628, 4 L.Ed.2d 1002, 80 S.Ct. 1050.

There is no provision allowing state taxation of property held under Chapter 14A. However, Section 646 of the Small Business Act does declare a policy as to lien priority with state taxes. Section 646 reads:

"Any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property for taxes due on the property to a State, or political subdivision thereof, in any case where such lien would, under applicable State law, be superior to such interest if such interest were held by any party other than the United States."

In U.S. v. Christensen, supra, at page 723, the court speaks of the purpose of Section 646, saying:

"The parties agree that the obvious purpose of this statute was to place the SBA in the position of a private party with respect to the relative priority of its mortgage liens. By the statute itself state law is made determinative."

Missouri provides for a lien for real property taxes which shall accrue and be an encumbrance as soon as the amount of the taxes is determined by assessment and levy. This lien shall continue to be enforced as provided for by law until all taxes are fully paid or the land sold. Section 137.085, RSMo 1959. The Missouri Supreme Court holds that a state tax lien for real property taxes "takes

precedence over and is superior to all other liens whether prior or subsequent", Lucas v. Murphy, 348 Mo. 1078, 156 S.W.2d 686, 689.

Thus by putting the Small Business Administration in the position of a private party in Missouri, the tax lien for 1963 takes precedence to the trust deed.

The question then is whether this superior tax lien remains as an encumbrance on the property after the foreclosure sale. In Missouri, if the property is purchased by a private party, the property is still encumbered. State, to Use of Hoffman, v. Stelbrink, 58 Mo. App. 662; Fleckenstein v. Baxter, 114 Mo. 493, 21 S.W. 852; Evans v. Brussel, Mo., 330 S.W.2d 788, certiori denied 361 U.S. 919, 4 L.Ed.2d 740, 80 S.Ct. 673. The Supreme Court of the United States met this question when the Federal Government was the purchaser of encumbered property, United States v. State of Alabama, 313 U.S. 274, 85 L.Ed. 1327, 61 S.Ct. 1011. The Court at page 1014 said:

"The Government brings this suit in the view that it is entitled to have a marketable title and it seeks to remove the liens in question as clouds upon that title which would interfere with the disposition of the lands in the future. From that standpoint the Government asks a decree declaring the invalidity of the liens and enjoining the State from asserting any claim in the lands either adverse to the United States or to its successors in title. We think that the United States is not entitled to that relief. The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date."

The taxes, then, remain as a lien on the property unless Missouri provides for an exemption. Article 3, Section 43, of the Missouri Constitution says that "No tax shall be imposed on lands the property of the United States; . . . ."

In a Condemnation Case, Collector of Revenue Within and For the City of St. Louis, Mo. v. Ford Motor Co., 158 F.2d 354, 355, the Court said:

"When the United States appropriated the land in question under the power of eminent domain, the lien for taxes could not thereafter be specifically enforced against the property taken, but the effect of the condemnation proceeding was to transfer the lien from the land to the award in the registry of the court."

In United States v. Certain Land Situated in City of St. Louis, Mo., 51 F.Supp. 80, another Condemnation Case, the Court refers to Article 3, Section 43, when turning to the question of whether property taxes in Missouri are to be paid after the property has been acquired by the United States. The Court at page 83 says: "In Missouri, property becomes immune from taxation when appropriated to public use." The Court cites Bannon v. Burnes, C.C.W.D. Mo., 39 F. 892, and State ex rel. v. Baumann, 348 Mo. 164, 153 S.W.2d 31, which hold that government property is immune from previous taxes in that such taxes may not be collected. The Court also cites United States v. Alabama, supra, as holding that such a tax lien cannot be enforced against the property when owned by the United States but that the title is encumbered by the lien.

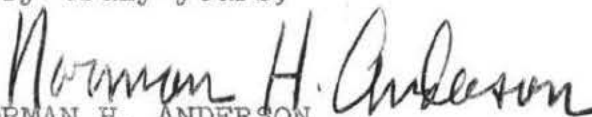
Thus, United States property in Missouri is immune from property taxes being "imposed" in that no tax can be levied and assessed once the United States takes title, nor can prior liens be enforced against the property. But it is our opinion that taxes are not being "imposed" on the property when a lien continues to be an encumbrance on the title.

#### CONCLUSION

It is the opinion of this office that if state taxes have become a lien on Missouri real property during the time of private ownership, this lien continues to be an encumbrance on the property after acquisition by the Small Business Administration, but that the lien is not enforceable as long as the Federal Government holds title. Also, the property is not subject to new levy and assessment for taxes while title is in the Federal Government.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



February 3, 1965



M. D. Overholser, M.D.  
Secretary  
Missouri State Anatomical Board  
Columbia, Missouri

Dear Dr. Overholser:

This is in answer to your request for an opinion of this office as to whether the Immaculate Conception Clinic of Structural Medicine located in Kansas City, Missouri, herein called the "Clinic" is entitled to receive unclaimed dead bodies from the Missouri State Anatomical Board.

The disposition of unclaimed bodies by the Anatomical Board is governed by Sections 194.120 - 194.180, RSMo 1959. Section 194.120 provides in part:

"1. That the heads of departments of anatomy, professors and associate professors of anatomy at the educational institutions of the state of Missouri which are now or may hereafter become incorporated, and in which said educational institutions human anatomy is investigated or taught to students in attendance at said educational institutions, shall be and hereby are constituted the Missouri State Anatomical Board, \* \* \*.

"2. The board shall have exclusive charge and control of the disposal and delivery of dead human bodies, as described in sections 194.120 to 194.180, to and among such educational institutions as under the provisions of said sections are entitled thereto."

Sections 194.130, 194.140 and 194.160 set out the procedure by which proper educational institutions desiring to receive dead bodies may do so. Inasmuch as the Clinic has indicated its ability and willingness to comply with this procedure, the question is: Is the Clinic a proper educational institution as defined in Section 194.120 entitled to receive dead human bodies?

The Clinic is operated by one Dr. E.J. Auckley, who is registered in this state as a Doctor of Osteopathy. In a letter to the Board, Dr. Auckley stated that the Clinic is an incorporated college chartered to teach the Marian Method of Structural Manipulation to be used primarily for the treatment of poliomyelitis and related diseases. The work involves strict manual manipulation of the musculo-skeletal system and no internal medicine, O.B. or surgery is used by a graduate of the school unless he holds an M.D. degree. The course is a seven year course and a graduate thereof is awarded a D.S.M. degree which apparently means Doctor of Structural Manipulation. Dr. Auckley states that at this time, he has only one student who is in her sixth year of college and one graduate student that will study dissection with the first student.

An investigator for the Anatomical Board investigated the facilities at the Clinic and in a letter to the Board, among other things, stated:

"Dr. Auckley, owner of the school, met me and showed me to a two room house just south of his living quarters. One of the rooms was a bedroom that occupied by a small child, a patient of Dr. Aukleys. The other room, measuring approximately 12 by 16 ft., was being used as living quarters by a Miss Shirley Granger, the one student that the School has enrolled.

"This room was furnished with a range, refrigerator, sink, table and chairs, divan, rocking chairs, etc. The type of furnishings one would expect to find in a combination kitchen, dining and living area.



"There was no evidence of any provisions to care for cadaver material. When asked, Dr. Auckley stated that the cadaver would be kept in this room and that the teaching and dissection would be done here also.

"At the time of my visit there were no facilities available for teaching human anatomy by dissection of human material and no indication that any would be provided in the near future."

It is also our understanding that Miss Granger is a victim of polio and is being treated by Dr. Auckley as a patient.

The statutes authorizing the distribution of dead bodies do not provide a definition of the term "educational institution", nor do we attempt in this letter to provide a comprehensive definition of the term. However, we do not feel that the Clinic as it is now operated constitutes such an educational institution either in its generally accepted meaning or as it is used in the statutes. The pertinent statutes contemplate an "institution" where students are given a formal education in the anatomy of the human body by teachers and professors trained to give such an education. It would be unreasonable to find that the statutes were intended to include a "Clinic" which consists of a two-room outbuilding with no teaching or clinical facilities with one or two semi-student patients taught by a person, who although a doctor of osteopathy, has not provided any record of any training in the field of education.

The applicable statutes also seem to contemplate a careful and orderly disposal of dead bodies for educational purposes. Again it would be unreasonable to find that the Board would be required to distribute dead bodies to anyone who purports to set up an educational institution regardless of whether this "institution" has any facilities of using or keeping such bodies.

Therefore, in our opinion, the Immaculate Conception Clinic is not an educational institution as the term is used in Sections 194.120 - 194.180 and is not entitled to receive a dead human body under provisions of these statutes.

Very truly yours,

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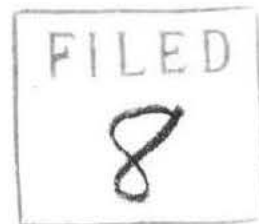
NORMAN H. ANDERSON  
Attorney General

CIRCUIT CLERKS:  
FEES:  
RECORDER OF DEEDS:

All fees received by a circuit clerk or a circuit clerk acting as ex officio recorder of deeds for certifying documents under his control by virtue of his office as circuit clerk or recorder of deeds may not be retained but must be paid into the county treasury.

Opinion No. 221 (1964)  
8 (1965)

February 3, 1965



Honorable Paul L. Bell  
Prosecuting Attorney  
Crawford County  
Steelville, Missouri

Dear Mr. Bell:

This is in reply to your recent request for an opinion of this office which reads as follows:

"I would like to know if the fees charged by the circuit court for certifying documents such as deeds, wills, judgments, etc., should be turned over to the county or if they would belong to the circuit clerk or deputy making same."

Crawford County is a third class county in which the offices of circuit clerk and recorder of deeds have been combined under authority of Section 59.040, RSMo 1959.

The primary duties of a circuit clerk together with the fees he shall receive for the performance of such duties are listed in Section 483.540, RSMo 1959. Included in these duties and the fee to be collected is:

"for certificate and seal . . . . \$.50."

Section 483.560, RSMo 1959 provides that fees "collected by virtue of his office except fees collected in cases of change of venue from other counties" may not be retained but must be paid into the county treasury. The duties listed in Section 483.540 are required of the circuit clerk and the fees collected for performing these required duties are "fees collected by virtue of his office" as the phrase is used in Section 483.560.

The recorder of deeds is also required to certify documents under his control and to collect a fee of \$.50 for each

Honorable Paul L. Bell

certification, Section 59.310, RSMo 1959. These fees also must be paid over to the county treasurer, Section 59.260, RSMo 1959.

#### CONCLUSION

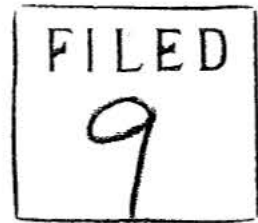
It is therefore the opinion of this office that all fees received by a circuit clerk or a circuit clerk acting as ex officio recorder of deeds for certifying documents under his control by virtue of his office as circuit clerk or as recorder of deeds may not be retained but must be paid into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

March 5, 1965



State Tax Commission of Missouri  
Jefferson Building  
Jefferson City, Missouri

Gentlemen:

You have made the following request for an opinion of this office:

"This Commission requests an official opinion from your department as to whether or not the De Kalb Water Corporation, when organized and operated in accord with the plans and agreements submitted herewith, will qualify for tax exemption under the provisions of Article 10, Section 6, Constitution of Missouri."

Submitted with your request for an opinion are an agreement pursuant to which the De Kalb Water Corporation was organized, a copy of the Indenture of Mortgage pursuant to which the De Kalb Water Corporation is to issue its revenue bonds, a copy of the Certificate and Articles of Incorporation, a copy of a ruling of the Bureau of Internal Revenue relating to the tax exempt status of interest on its revenue bonds, and a letter from the attorneys for the De Kalb Water Corporation contending that its property is exempt from taxation on the theory that its purposes are charitable.

The De Kalb Water Corporation was organized under Chapter 355, RSMo., and received a charter thereunder as a not-for-profit corporation. The purposes of the corporation as set forth in its Articles of Incorporation are as follows:

"(A) To own and operate a water system having as the ultimate civic object and purpose of this corporation the eventual vesting by gift from this corporation of

State Tax Commission of Missouri

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the complete ownership of, possession of and title in and to all assets of this corporation, existing at the time of said vesting in the Village of De Kalb, Buchanan County, Missouri, a Missouri municipal corporation, which gift will not only embrace the eventual ownership of, possession of and title in and to the water system but also the operation thereof by said Village;

"(B) To acquire by construction, purchase or otherwise, own and operate a complete water system in all or part of Buchanan County, Missouri, and to supply, distribute and/or sell water for municipal, domestic and industrial uses therein and to make and collect reasonable charges upon and for distribution and sale of its water and the use of any of its facilities;

"(C) From time to time hereafter to improve, enlarge and/or extend said water system and facilities and/or acquire, construct or make additions to said facilities and water system;

"(D) To acquire and/or develop additional sources of water supply for said water system and the acquisition of real or personal property therefor;

"(E) To possess, exercise and/or enjoy all the powers, rights, privileges, capacities, immunities and exemptions provided it under and by virtue of the Constitution, as amended at any time, and laws, now or hereafter in force, of the United States of America and State of Missouri."

It appears from the foregoing that the corporation was organized primarily for the purpose of acquiring and operating a water system in Buchanan County and engaging in the business of distributing and selling water for compensation.

The corporation was organized pursuant to an agreement by the three residents of the Village of De Kalb who became its incorporators and the Village of De Kalb. This agreement is too long to be set forth in this opinion or even to be adequately summarized herein. Briefly, the incorporators agreed to organize



State Tax Commission of Missouri

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the corporation and have it obtain all necessary rights, franchises, and permits so as to enable it to construct and operate a water system in Buchanan County. The agreement provides that the corporation, when organized, would issue its revenue bonds in the principal amount of \$505,000, would construct and operate the water system therein described, would grant to the Village of De Kalb an option to purchase all of its assets after February 1, 1979 (if it may legally do so), at an amount sufficient to retire the bonds of the corporation which may then be outstanding and that at such time as all bonds have been retired all of the assets of the corporation would become the property of the Village.

The Indenture of Mortgage is also too long to summarize. For purposes of this opinion it is necessary only to note that it requires the corporation to set its charges at an amount which will not only pay costs of maintenance and operation and interest on the bonds, but additional amounts to take care of principal payments and other items. In connection with your request, we have had the benefit of the ruling of the Public Service Commission of Missouri upon an application of De Kalb Water Corporation for a Certificate of Public Convenience and Necessity, and many of the essential facts are stated in that decision.

At the inception, the corporation will have the sum of \$6000, which represents deposits to secure future charges for water made by proposed consumers in anticipation of water service. This sum, together with the \$505,000 to be borrowed under the Indenture of Mortgage, will be used as capital for plant construction. The only source of revenue of the corporation will be from the sale of water. In order to pay interest and principal on the amount borrowed, the water must be sold at a price over and above its cost to the corporation together with the cost of system operation and maintenance. Thus, it appears that at the inception of the corporation, it will have no equity in the corporate assets. If and when principal payments are made on the bonds (and it is anticipated and provision made therefor, that some of the bonds will be called in advance of their maturity out of moneys received from sale of water), the equity of the corporation in its assets will constantly increase.

Article 10, Section 6 of the Constitution of Missouri exempts from taxation all property of the state, county, and other political subdivisions. Obviously, this corporation is not a political subdivision. It is simply a private corporation. The mere fact that there is an agreement which contemplates that ultimately the Village of De Kalb will acquire the assets of the corporation has no bearing upon the situation. The question is whether the property

State Tax Commission of Missouri

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is presently exempt, prior to the time title thereto may vest in the Village. We note in this connection that paragraph Second of the Articles of Incorporation refers to the "eventual vesting by gift from this corporation" of the assets existing at the time of said vesting in the Village of De Kalb. In the interim, and until such "eventual" vesting of the property, if ever, in the Village of De Kalb the property is owned and operated by a private corporation and is not therefore automatically exempt from taxation.

Section 6, Article 10 of the Constitution further authorizes the Legislature to enact general laws exempting from taxation "all property, real and personal, not held for private or corporate profit and used exclusively . . . for purposes purely charitable . . ." Section 137.100, RSMo. implements the quoted portion of the Constitution.

The basic questions therefore are whether, under the facts submitted, the water system of the De Kalb Water Corporation is (1) "not held for private or corporate profit" and (2) if so, whether the property is used for purposes exclusively charitable. In view of the conclusion we have reached on the first question, it is not necessary to determine whether property of a private (as distinguished from a public) corporation used in the operation of a water system is by virtue thereof used exclusively for purposes purely charitable within the meaning of Section 6, Article 10 of the Constitution and Section 137.100, RSMo. It is our opinion, under the facts submitted, that the property of De Kalb Water Corporation is and will be held for private or corporate profit within the meaning of Section 6, Article 10, and Section 136.100 RSMo., and for that reason such property is not exempted from taxation, without regard to whether or not it may be used for purposes purely charitable.

Under the facts submitted, the corporation is to be so operated that its charges will not only take care of all operating and maintenance costs but will be in an amount sufficient to reduce the corporate indebtedness and thereby enable the corporation to acquire valuable assets debt-free. In City of Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570, 1.c. 578-579, the court said:

"It also appears manifest that reduction of the indebtedness by payment of the principal of the bonds outstanding out of earnings can only be regarded as profit."

In Williams v. Town of Morristown, 132 Tenn. App. 274, 222 S.W.2d 607 1.c. 612, it was said:

State Tax Commission of Missouri

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"So, the operation of a water works system by a municipality for 'profit' means the system is being conducted on a commercial basis for revenue and not as a governmental enterprise out of public funds for the common good."

There are many definitions of the term "profit", too numerous to set forth in this opinion, some of which may be found in Volume 34, Words and Phrases, Permanent Edition. However, under any applicable definition, there can be no question but that an operation such as is here proposed, wherein the revenue to be received will be far in excess of the costs of operation and maintenance, necessarily results in profit. That the profit is being used to acquire and pay for a water system (or any other property) is of no consequence and does not alter either the essential profit-making nature of the operation or the fact that the operation is conducted on a commercial basis for revenue.

Of vital importance in determining whether its property is exempt under the constitutional provision and Section 137.100 is that the De Kalb Water Corporation, organized under Chapter 355, is not, under any possible theory, a public corporation. Public corporations hold their property in trust solely for public purposes, and any incidental profit inures presently to the benefit of the public. The documents you have submitted make it clear that the very reason De Kalb Water Corporation was organized was to make a profit from its business operations sufficient in time to pay for a water system. That the incorporators and members of De Kalb Water Corporation are prohibited by its Articles of Incorporation from receiving any part of the income or property of the corporation by way of dividend or otherwise (except as compensation for services rendered) does not mean that the property is not held for corporate profit. The Constitution and statute do not require that the profit be received by the members of the corporation. It is sufficient only that the corporation hold the property for profit in order to exclude such property from the benefit of the tax exemption. In our opinion, the corporation's purpose is to derive a profit from the property. It follows that if the corporation is operated as set forth in the documents submitted by you, its property will be held for corporate profit.

We have not overlooked the fact that De Kalb Water Corporation was organized as a not-for-profit corporation under Chapter 355. In determining whether the property of the corporation is exempt from taxation, neither the Articles of Incorporation, the charter issued to such corporation, nor the statute under which it obtained its charter governs the ultimate decision. See Celina and Mercer County Telephone Co. v. Union-Center Mutual Telephone



State Tax Commission of Missouri

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Association, 102 Ohio 487, 133 N.E. 540. The true test is not its charter, but the character of its business, its method of conducting such business and the actual purpose for which the property is held and used.

For purposes of this opinion, it is necessary to rule only that the property of the De Kalb Water Corporation is held for corporate profit and therefore is subject to taxation. The further question of whether the corporation was properly organized under Chapter 355, that is, whether a water corporation for gain may properly be organized as a not-for-profit corporation pursuant to Chapter 355, is not considered herein and we express no opinion upon that question.

It is the view of this office under the facts submitted, that the property of the De Kalb Water Corporation is not exempt from taxation.

Very truly yours,

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NORMAN H. ANDERSON  
Attorney General

JN:mac

COSMETOLOGY BOARD:  
BOARD OF COSMETOLOGY:

Use of brush rollers brought into a cosmetology shop or school by a patron to be used solely and exclusively upon the head of such patron is not prohibited.

OPINION NO. 12 (1965)  
OPINION NO. 304 (1964)

February 4, 1965

Honorable Carroll M. Blackwell  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri



Dear Mr. Blackwell:

The request for an opinion by your predecessor in office poses a question concerning the regulation of the State Board of Cosmetology prohibiting the use of brush rollers in shops and schools of cosmetology. The question reads as follows:

"I would like to know whether, in view of this regulation, a woman may purchase her own brush rollers, take them to a beauty shop, have them used upon her hair, and take them home, repeating this process from time to time, the rollers being used by nobody but her or upon her."

The regulation referred to was filed by the State Board of Cosmetology on June 2, 1964, and went into effect on June 12, 1964. It reads as follows:

"The use of brush rollers and brush curlers is prohibited in shops and schools of cosmetology."

This regulation was adopted shortly after an opinion of this office concluded that brush rollers could be prohibited if it were impracticable to keep them sanitary.

The reasoning given in such Opinion of the Attorney General, No. 58, May 15, 1964 (which is enclosed), at page 5, is as follows:

"Under Section 329.210, RSMo, the board has the power to issue such reasonable sanitary rules as it deems necessary. If it is

impracticable to use brush curlers in a sanitary manner, then a regulation prohibiting their use would be authorized by this section as promoting sanitation. On the other hand, if it were practicable to use such brush curlers in a sanitary manner, then a regulation prohibiting their use would be unreasonable since it would be outlawing the use of an article not inherently unsanitary and would be infringing on property rights unnecessarily. If such be the case, a regulation requiring brush curlers to be kept in a sanitary condition would be reasonable and serve the same end as prohibition." (Emphasis supplied.)

Since this is a rule relating to health and sanitation, it must necessarily be designed to promote sanitation and be reasonable. It is obvious that the purpose of the rule is to prevent spreading contagious and infectious diseases through the use of the same brush rollers on more than one customer.

The use of brush rollers by an operator that were brought by the patron to be used solely and exclusively on the head of the one who brought them is not within the purview of the rule. Brush rollers used in such manner would not spread contagious or infectious diseases since they are used only on the patron who brought them into the school or shop.

Administrative rules, like statutes, are presumed to be reasonable. *Warning v. Thompson, Mo.*, 249 S.W. 2d 335. To interpret the rule to include brush rollers brought in the shop by a patron to be used solely and exclusively on that patron's head would be to give the rule an unreasonable interpretation. Therefore, the rule should not be interpreted to give such a result. The use of brush rollers in such manner is not prohibited.

#### CONCLUSION

Therefore, it is the opinion of this office, that the use of brush rollers brought into a cosmetology shop or school by a patron to be used solely and exclusively upon the head of such patron is not prohibited.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jeremiah D. Finnegan.

Very truly yours,

  
NORMAN H. ANDERSON

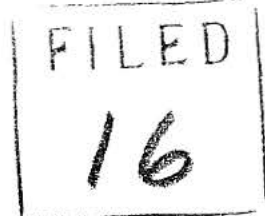
BOARD OF COSMETOLOGY:  
COSMETOLOGY BOARD:  
LICENSES:  
SCHOOL DISTRICTS:

- (1) Local school district that desires to operate a school of cosmetology must apply for registration and pay annual fee of \$125.00.
- (2) Students of such schools must be registered and pay the student license fee.

OPINION NO. 16 (1965)  
OPINION NO. 334 (1964)

February 4, 1965

Mrs. Jakaline McBrayer  
Executive Secretary  
Missouri State Board of Cosmetology  
Rooms 127-129 Capitol Building  
Jefferson City, Missouri



Dear Mrs. McBrayer:

Your recent request for an opinion raises two questions. The questions may be restated as follows:

- (1) May the Board of Cosmetology charge a local school district a fee for a license to operate a school of cosmetology?
- (2) Are students taking the courses for the classified occupations of cosmetologist, hairdresser or manicurist in a local school district cosmetology school required to pay a fee for a student license?

It is unlawful under Sections 329.040 and 329.250, RSMo, to operate a school teaching the classified occupations of cosmetology, hairdressing or manicuring without obtaining a certificate of registration as required by Section 329.040, RSMo.

Section 329.040, after setting forth the qualifications and procedures for obtaining a license to teach cosmetology, hairdressing and manicuring, provides:

"2. . . . No school, as provided in this chapter, shall operate within this state unless a proper certificate of registration under this chapter has first been obtained."

Section 329.250 makes it a misdemeanor for "Anyone . . . who shall act in any capacity, wherein a certificate is required, without a certificate . . . ." Thus it is a misdemeanor to operate a school of cosmetology, hairdressing or manicuring without being registered properly.

If a local school district wishes to offer a school for the classified occupations of cosmetology, hairdressing or manicuring, it is necessary for the local school district to follow the procedures and satisfy the requirements of Section 329.040, RSMo, which provides:

"1. Any person may apply to the state board of cosmetology for a certificate of registration of a school for any one or more of the classified occupations within this chapter upon the payment of a reasonable annual fee of one hundred twenty-five dollars for the school, per year or any part thereof. If the school license fee is not paid on or before the first day of July of each year, there shall be a fifteen dollar penalty, added to the regular fee making a total of one hundred forty dollars.

"2. No such school for hairdressers or cosmetologists within this chapter shall be granted a certificate of registration unless it shall attach to its staff a regularly licensed physician and employ and maintain a sufficient number of competent instructors, registered as such, but not less than one instructor to each twenty students, and shall require a course of training not less than one thousand two hundred twenty hours over a period of six consecutive months for the classified occupation of hairdresser and cosmetologist and not less than one hundred and fifty hours for the classified occupation of manicurist, such training to include practical demonstrations, written or oral tests, and practical instructions in sanitation, sterilization and the use of antiseptics, cosmetics and electrical appliances, consistent with the practical and theoretical requirements as applicable to the classified occupations as provided in this chapter; provided, however, that when the classified occupation of manicuring is taken in conjunction with the classified occupation of hairdresser



and cosmetologist as provided in this chapter there need be no additional hours added to said classification for the occupation of manicuring. No school, as provided in this chapter, shall operate within this state unless a proper certificate of registration under this chapter has first been obtained."

It is to be noted that these provisions apply to "any person" who wishes to operate a cosmetology school. The term "person" by statute, Section 1.020, RSMo, is broad enough to include a local school district. The statute provides:

Section 1.020, RSMo. "As used in the statutory laws of this state, . . . unless plainly repugnant to the intent of the legislature or to the context thereof:

\* \* \* \* \*

"(7) The word 'person' may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations." [Emphasis supplied.]

To apply the term "person" (as used in Section 329.040, RSMo) to local school districts is not "plainly repugnant to the intent of the legislature or to the context" of the statute. The purpose of the statute is to protect the public health and safety through the regulation and supervision of cosmetology schools by the Board of Cosmetology. There are dangers to public health and safety inherent in the practice of cosmetology. The cosmetologist works with chemicals and equipment on human subjects which in the hands of the untrained could cause serious injury or even death of the subject. Thus the legislature requires a school teaching the courses in cosmetology, hairdressing or manicuring: to have a licensed physician on the staff; have qualified instructors; offer the course of training for a certain minimum number of hours; give practical instructions in sanitation, sterilization, use of antiseptics, cosmetics and electrical appliances, as well as teach a course of study designed to qualify its students as cosmetologists, hairdressers or manicurists. To supervise the school to determine if the statutes are complied with, and to regulate the field, the legislature created the Board of Cosmetology, composed of experts - registered cosmetologists. It is clear then that the purpose of the legislature in the use of the phrase "any person" was to

include all operators of schools of cosmetology in the state whether individuals, partnerships or local school districts.

This intent is further evidenced by Section 329.050 (2), RSMo, Supp. 1963, which requires that applicants for examination and registration must have served as an apprentice or "shall have had the required time in a registered school" (emphasis supplied). No applicant may be licensed who was a student in an unregistered school, only students of registered schools or apprentices may be licensed. Thus for a student of a school of cosmetology operated by a school district to be eligible for a license to practice cosmetology, such school district must have operated a registered school or else the student could not become licensed.

For a person to receive a certificate of registration to operate a school, in addition to fulfilling the other necessary requisites of Chapter 329, RSMo, it is necessary to pay an annual fee of one hundred twenty-five dollars. This provision applies to all applicants for a school license. The fact that the Board of Cosmetology and a local school district are both instrumentalities of the State of Missouri does not relieve the school district of the necessity of fulfilling this statutory requirement.

Since the exercise of the state's police power is involved, this fee is not a tax on a school district but rather a regulatory fee incidental to the exercise of the police power. The Supreme Court of Missouri has held in Kansas City v. School District of Kansas City, Mo., 201 S.W. 2d 930, that a regulatory fee incidental to the exercise of a police power is not a tax, hence the city could charge the school district a fee for building inspection.

Your second question regarded payment of a fee for a student license by students of a school of cosmetology operated by a local school district.

Students and apprentices are required by Section 329.070, RSMo, to register with the Board of Cosmetology and pay a registration fee of one dollar. Students of schools of cosmetology, hairdressing or manicuring operated by a local district are in no different position than students of schools operated by private individuals, thus they must pay the fee to the Board of Cosmetology.



Mrs. Jakaline McBrayer

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#### CONCLUSION

Therefore, it is the opinion of this office that: (1) A local school district that desires to operate a school of cosmetology, hairdressing or manicuring must apply for registration and pay the annual registration fee of one hundred twenty-five dollars to the Board of Cosmetology; (2) Students of such schools operated by local school districts must also be registered and pay the fee for a student license to the Board of Cosmetology.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jeremiah D. Finnegan.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

June 28, 1965



Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

Reference is made to the submission by your office for examination by this office of documents executed by Old American Insurance Company in regard to proposed amendments of the Articles of Association which would authorize the company to issue nonvoting "Class A" stock. These documents consist of certified copies of the minutes of the meeting of the Board of Directors held on November 3, 1964, recommending the adoption of the amendments, minutes of the special meeting of stockholders held on November 3, 1964, adopting the amendments, and the Affidavit of Publication of the Declaration of Amendment of the Articles of Association.

It is noted that at the special meeting of the stockholders referred to above, holders of all the shares of outstanding capital stock were present either in person or by written proxy and that the amendments were adopted by an affirmative vote of all shares of stock entitled to vote. Issuance of the nonvoting "Class A" stock authorized by the amendments will result in a capital increase of \$2,000,000.00. The newly authorized stock will be issued to existing stockholders as a stock dividend by transferring \$2,000,000.00 from earned surplus to capital. The result of the stock dividend will be to retain the earned surplus as permanent capital, thus, substantially adding to the capital integrity of the company with resulting substantial increased protection to its policy holders.

Upon an examination of the documents referred to above and with reference to the comments made in regard thereto

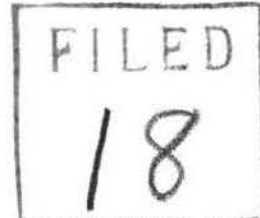
above, it is the opinion of this office that the documents are in accordance with the provisions of Chapters 375 and 376 RSMo 1959, and are not inconsistent with the constitution and laws of this state and the United States.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Opinion No. 18 (1965)  
No. 337 (1964)  
Answered by Letter

March 23, 1965



Honorable J. R. Fritz  
Prosecuting Attorney  
Pettis County  
Sedalia, Missouri

Dear Mr. Fritz:

This opinion is in response to your request of September 25, 1964, regarding the following:

" . . . as to whether or not the Juvenile Division of the Circuit Court under Chapter 211 of the Missouri Statutes would have jurisdiction of a child under the age of 17 years for the purpose of ordering the commitment of said child to the State School at Marshall, Missouri, upon a petition filed by the Juvenile Officer alleging that the said child is suffering from cerebral palsy causing a mental and physical deficiency to such an extent that the parents of said child cannot furnish for the child proper care and medical because of the increasing need on the part of said child for specialized care on account of said disease, even though the parents are doing their best to care for the child but at the same time the parents are not trained or equipped to furnish the specialized care that the child requires."

In a subsequent telephone conversation with you, you advised that the parents were in no way fighting this action by the juvenile court and were in fact seeking the juvenile court to obtain jurisdiction over their children. Your question calls for two answers: (1) Can a juvenile court obtain jurisdiction of a juvenile under the facts? (2) If the court has jurisdiction, what can it at that time, do with that child?

Honorable J. R. Fritz

In the recent case of In Re Linda, 362 SW2d, 782, a Kansas City Court of Appeals case, the court held that a juvenile court could obtain jurisdiction of a mentally disturbed child and if it was in the best interests of the child, remove the child from the control of the parents and send the juvenile to a state hospital. The court cites Section 211.011, RSMo 1959, which describes the purpose of the juvenile act. Also, the court refers to Section 211.031, RSMo 1959, citing specifically Section 1, Subsection C of that statute:

"Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

"(1) Involving any child who may be within the county who is alleged to be in need of care and treatment because:

"(c) The behavior, environment or associations of the child are injurious to his welfare or to the welfare of others;  
\* \* \* "

It would thus seem that the court of appeals has held 211.031 to apply to mentally disturbed children.

I am also enclosing attorney general's opinion to Addison M. Duval, Director of the Division of Mental Diseases, dated January 16, 1961, dealing with the jurisdiction of the juvenile court to commit a child to a state hospital under Section 211.201. We believe, since the child may be committed to the Division of Mental Diseases for care and treatment and since the state school at Marshall is in that division, the court could order the child committed to that institution. As a practical matter, however, by reasoning from the In Re Linda case, the court tends to look at a case where the juvenile court has taken the child away from the parents in a very critical manner. Just the practical considerations of your case, where the parents are in agreement with the removal of the child to the state school, makes this disposition much easier.

The language of the statute is broad enough to authorize the juvenile court to take jurisdiction of this child based on the facts related, and when the court has jurisdiction over the child it may then order the child committed to any state

Honorable J. R. Fritz

school or state mental hospital.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

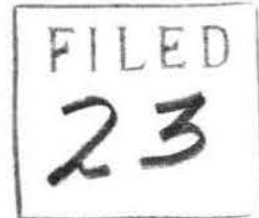
Enclosure (1)

APPROPRIATIONS: (1) Soil and water districts, so long as they are acting within their powers granted them by state statute  
CONSERVATION COMMISSION  
OUTDOOR RECREATION: may be eligible to receive funds from Public Law 88-578 where federal requirements are met; (2) however, an appropriation would be needed to transmit these funds from the State to local government units; and (3) the designation of the Inter-Agency Council for Outdoor Recreation as the state agency in Missouri would be in conformity to Public Law 88-578.

February 10, 1965

OPINION NO. 23 (1965)  
372 (1964)

Mr. William E. Towell, Director  
Missouri Conservation Commission  
Highway 50 West  
Jefferson City, Missouri



Dear Mr. Towell:

This is in answer to your recent request for an official opinion of this office on three questions relating to the Federal Land and Water Conservation Fund Act of 1965.

In effect, your first question asks whether funds may be transferred under this act to Missouri Soil and Water Districts.

Section 5 (f) of Public Law 88-578 (the Federal Land and Water Conservation Fund Act of 1965, effective January 1, 1965) provides in part as follows:

"If consistent with an approved project, funds may be transferred by the State to a political subdivision or other appropriate public agency."

Clearly a soil and water district is a "public agency" within the meaning of the above-quoted federal act, and the question becomes whether it is an "appropriate" public agency. It is our view that a soil and water district may properly participate in the federal program so long as the project in question is one which is within the authority conferred upon soil and water districts by Sections 278.060 through 278.155, RSMo Cum. Supp. 1963. Obviously, a soil



Mr. William E. Towell

and water district is not empowered by these sections to embark upon such ventures as the creation of a system of parks. On the other hand, these districts are created for the purpose of soil and water conservation. Consistent with this purpose, such districts often engage in the construction of lakes. If the construction of such a lake is also consistent with the recreational aims of the federal act, the district would be an appropriate public agency under the federal act insofar as this particular project is concerned.

In this regard, it is to be noted that Section 278.080, RSMo 1963 Supp., states, in part, that the State Soil and Water Districts Commission " . . . shall receive and properly convey to the soil and water districts any other form of aid extended to such districts by any other agency of this state . . . ."

Your second question asks whether "an appropriation must be made to permit the state to transmit these funds to the local government units".

The federal act in question, Public Law 88-578, supra, is entitled, "AN ACT to establish a land and water conservation fund to assist the States and Federal agencies in meeting present and future outdoor recreation demands and needs of the American people, and for other purposes" [Federal acquisition of certain areas].

This act allocates the appropriations "on the ratio of 60 per centum for State purposes and 40 per centum for Federal purposes". Throughout the portion of the act dealing with "Financial Assistance to States", there are numerous expressions of the Federal intent that these appropriations are made to the States.

Section 5 (a) of the Act reads, in part, as follows: "The Secretary of the Interior (hereinafter referred to as the "Secretary") is authorized to provide financial assistance to the States from money available for State purposes".

Section 5 (f) of the Act provides in part that: "If consistent with an approved project, funds may be transferred by the State to a political subdivision or other appropriate public agency". This determination that any transfer of funds, to lesser political units in the State, is within the discretion of the State, further substantiates the view that this allocation of money from the Federal government is appropriated to the State, and not merely

Mr. William E. Towell

given through the State to other political subdivisions.

The receipt of money by the State is controlled by Article IV, Section 15, of the Constitution of Missouri, which states in part as follows:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state . . ."

It is clear then that money once received by the State for state purposes is state money.

Article IV, Section 28, of the Constitution of Missouri, describes the manner in which withdrawals may be made from the state treasury, and reads in part as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it . . ."

Thus, an appropriation would be required to permit the state to transmit these funds to local government units.

Your third question asks, "Would the proposed legislation to create an Inter-Agency Council for Outdoor Recreation give Missouri the necessary authority to meet the Act requirement?"

Section 5 of this proposed act reads as follows:

"The state inter-agency council for outdoor recreation shall be:

"(1) the official state agency for liaison with the federal bureau of outdoor recreation; and

Mr. William E. Towell

"(2) the official state agency to receive and disburse federal funds available to this state for overall outdoor recreation planning; and

"(3) the official state agency to receive and allocate to the appropriate state agencies, political subdivisions, or other public agencies, federal funds available from the Land and Water Conservation Fund, P.L. 88-578, for outdoor recreation programs

"(4) a forum for consideration of outdoor recreation problems affecting member agencies and an advisory and planning agency for overall outdoor recreational programs. The council may provide information and advisory services for any political subdivision requesting its services."

(It is suggested that the following: "; and" be added at the end of Subdivision 3 of Section 5 of the proposed Act. In addition, it is suggested that Section 2 and Section 3 should each consist of one paragraph, or that the other paragraphs now included therein be numbered.)

Thus, by state law, Subdivision 3 of Section 5 of the proposed Act, the Inter-Agency Council for Outdoor Recreation would be designated "the official state agency to receive and allocate to the appropriate state agencies, political subdivisions, or other public agencies, federal funds available from the Land and Water Conservation Fund, P.L. 88-578, for outdoor recreation programs".

This would be in conformity to the federal requirements of Section 5 (f) of Public Law 88-578 which states, in part, as follows:

"Payments for all projects shall be made by the Secretary to the Governor of the State or to a State official or agency designated by the Governor or by State law having authority and responsibility to accept and to administer funds paid hereunder for approved projects."

Mr. William E. Towell

#### CONCLUSION

Therefore, it is the opinion of this office that (1) soil and water districts, so long as they are acting within the powers granted them by state statute, may be eligible to receive funds from Public Law 88-578 where federal requirements are met; (2) however, an appropriation would be needed to transmit these funds from the State to local government units; and (3) the designation by state law of the Inter-Agency Council for Outdoor Recreation as the state agency in Missouri would be in conformity to Public Law 88-578.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas E. Eichhorst.

  
NORMAN H. ANDERSON  
Attorney General

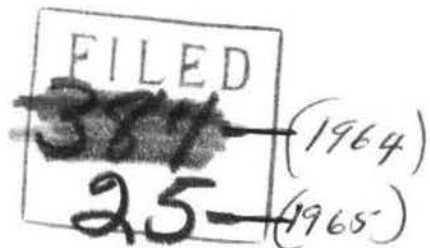
CHARTER CITIES:  
LICENSE TAX:  
VENDING MACHINES:  
MUNICIPAL CORPORATIONS:  
SCHOOL DISTRICT:

A constitutional charter city, if authorized by the charter, may impose a license tax on vending machines owned or rented by a school district and located within such city, as the tax imposed is not on property owned by the school district, but on the privilege of using such vending machines.

OPINION NO. 387 (1964)  
OPINION NO. 25 (1965)

December 23, 1965

Honorable Maurice Schechter  
State Senator, 13th District  
41 Country Fair Lane  
Creve Coeur 4, Missouri



Dear Senator Schechter:

This is in answer to your request for an opinion of this office, which request reads as follows:

"May a chartered city impose a license tax on vending machines owned or leased by a school district, situated in its high school? The net proceeds or profit made from such vending machine go into the cafeteria fund of such school district.

"To be more explicit, this school district has a number of modess machines which they own and the city is attempting to impose a license fee on each such machine.

"The school district also leases soda vending machines on a flat monthly basis and receives all profits from the sale of soda and the city is also attempting to assess a license fee on the same. The lease provides that all licenses shall be paid by the lessee."

Honorable Maurice Schechter

This request asks two questions, the first is:

"Is a school district required to pay a license fee to the city on vending machines they own, where the profits from such machines go into the school fund?"

In answer to question one of your request, your attention is first directed to Section 71.610, RSMo 1959, reading as follows:

"No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

From the foregoing statutory requirement, it is apparent that an examination of the charter is necessary to determine what "business avocations, pursuits or callings" are especially named as taxable.

Article III, Section 3.10(30) of the City Charter of Florrisant states:

"The Council shall have all powers vested in it by the constitution and statutes of the State of Missouri and this Charter, including, but not limited to, the following powers which shall be exercised by ordinance:

\* \* \* \*

"(30) To license, tax and regulate all businesses, occupations, professions, vocations, activities or things whatsoever set forth and enumerated by the laws of Missouri now or hereafter applicable to constitutional charter cities or cities of the first, second, third or fourth class, or any population group, and which any such cities are not or may hereafter be permitted by law to license, tax and regulate."



Honorable Maurice Schechter

This charter provision, supra, does not expressly list those businesses, avocations, activities, etc., that may be licensed or taxed, but incorporates statutes which do enumerate their taxable and licensable activities. This form of incorporation was approved in General Installation Company v. University City, Mo., 379 S.W. 2d 601, 604:

"If the incorporation by reference technique is permissible, and it is in Missouri, the incorporated language becomes a part of the incorporating legislative act for all purposes . . . and that by such authorized technique the business of respondent was 'specially named in the charter as taxable' to the same extent and with the same effect as if the words and terms of the incorporated statutes had been copied and set forth in the charter haec verba . . ."

One licensing authority provided in the Charter, supra, is taking authority of First Class Cities. Section 73.110, regarding first class cities, states in part:

"The mayor and common council shall have power within the city, by ordinance, not inconsistent with the constitution or any laws of this state or of this chapter:

\* \* \* \* \*

"(17) To license, tax and regulate \* \* \* automatic selling machines or devices \* \* \*".

Your question as stated indicates that the item being licensed is a vending machine (or automatic selling machine or device) and the license imposed is not a property tax, but a privilege or excise tax.

"We therefore conclude the tax imposed on the operation of slot machines . . . is not a merchants occupation tax . . . but is a privilege tax . . ."  
Edmonds v. City of St. Louis, 348 Mo. 1063, 156 S.W. 2d 619, 624.



Honorable Maurice Schechter

In State v. Smith, 90 S.W. 2d 405, the court, speaking on the authority of the Legislature to impose a tax on sales or transactions with a subordinate branch of the government, stated:

" . . . The weight of authority seems to be that, as applied to counties, municipalities and other subdivisions, exemption from property taxes does not ordinarily extend to excise taxes . . . "

It is therefore the opinion of this office that a charter city may impose a license tax on the vending machines owned by the school district, for the reasons stated above.

Your second question deals with basically the same problem and reads:

"Is a school district required to pay a license fee to the city on vending machines which it leases, where the terms of the lease provide all licenses shall be paid by the school district, these vending machines being leased to the school district on a flat monthly basis."

The difference between the first and second question turns on the ownership of the machines. It is the opinion of this office that the license imposed is on the use or privilege, not on the ownership. It would appear that ownership is not a factor when dealing with excise taxes.

In Edmond v. City of St. Louis, supra, at page 622, the court, dealing with cigarette vending machines, states:

" . . . the Tax must be paid and the license obtained by the operator of the machine, permissive or actual. The operator is the person, firm or corporation who exercises the privilege of managing or conducting the machine. Webster's New International Dictionary; 29 Words and Phrases, Perm Ed., pp. 537, 584. Appellants plead in their petition that they have obtained the machines by lease or bailment and conduct their cigarette businesses exclusively there-through. That makes them the actual operators and answerable for a violation of the ordinance."

Honorable Maurice Schechter

In Food Center of St. Louis, Inc., v. Village of Warson Woods and City of Rock Hill, 277 S.W. 2d 573, 578, the court said:

" . . . 'The subject matter of a business or occupation tax, however, is not the sale, even though sales of the character specified are utilized as a measure of the tax to be assessed, and are essential to a determination that a person is engaged in a taxable occupation. It is not a privilege tax on purchasers, or a tax on the property or the income. It is on the privilege or occupation, that is, on the person for the privilege of engaging in the business or occupation designated, . . . '".

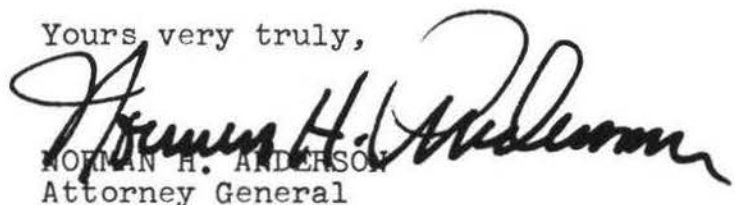
It is our opinion that a license fee can be imposed upon the school district for vending machines which they rent, as the school district is being licensed for the privilege of having and using the vending machines; actual ownership of these vending machines is not the determining factor. This opinion is based upon the assumption that the City in question (Florissant) has ordinances applicable to the facts as stated.

#### CONCLUSION

It is therefore the opinion of this office that a constitutional charter city, if authorized by the charter, may impose a license tax on vending machines owned or rented by a school district and located within such city, as the tax imposed is not on property owned by the school district, but on the privilege of using such vending machines.

The foregoing opinion which I hereby approve was prepared by my assistant, Gerald L. Birnbaum.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Opinion No. 405 (1964)  
Answered by Letter (DeFeo)

January 14, 1965

Honorable Peter J. Grewach  
Prosecuting Attorney  
Troy Building  
Troy, Missouri



Dear Mr. Grewach:

This letter is in response to your request of November 30, 1964, for an official opinion of this office. You inquire:

"If a student found technically eligible for placement in a class for young educable mentally retarded adolescents and for whom the school establishes a modified curriculum in accordance with the curriculum guide and suggestions received from the State Department of Education can compel the School District to pay tuition for such child in another district or be required to furnish transportation to a Special School District when such child has not officially enrolled in the school and the district in which such child is located and the modified curriculum placement has not been tried and evaluated?"

Section 163.310 RSMo 1959, imposes a duty upon school districts, to wit:

"The board of education of any school district shall provide appropriate instruction for all handicapped children residing in the district between the ages of six and twenty years, who are educable and capable of benefiting by special training. \* \* \*"

Honorable Peter J. Grewach

The school district has three options by which it may fulfill this obligation. These are set out in subsection 2, to wit:

"School districts shall provide instruction for handicapped children under the provisions of this section by establishing special classes, by contracting with nearby districts for the training of one or more such children or when any child cannot attend classes economically, safely or conveniently by providing adequate home instruction. Five hours of home instruction is considered to equal one week of school work per child."

Your letter informs us that your school district has elected to "establish special classes." Having thus fulfilled its duty under Section 163.310 the district cannot be compelled to send educable handicapped pupils to another district.

Of course, if the district cannot be compelled to send such pupils to another district, it follows that it cannot be compelled to furnish transportation to another district.

If the above leaves any particular areas of doubt, we shall be pleased to answer further specific questions.

Yours very truly,

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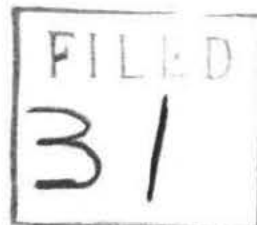
NORMAN H. ANDERSON  
Attorney General

LCD:df

Opinion No. 406 (1964), and No. 31 (1965), answered by Joseph Nessenfeld, by letter.

(See Op 133-196P)

January 26, 1965



Honorable Paul D. Hess, Jr.  
Prosecuting Attorney  
Macon, Missouri 63552

Dear Mr. Hess:

This is in reply to your recent request to this office to review the Attorney General's opinion dated February 28, 1933, to Honorable Forrest Smith. This opinion holds that expenses incurred for medical services to a prisoner in a county jail constitute costs incurred on behalf of the defendant for which the state is not liable.

Your letter states that two indigent defendants, while in custody of the Macon County Sheriff, in the Macon County Jail, received medical attention under the provisions of Section 221.120, and that said defendants were ultimately sentenced to terms of imprisonment in the Missouri State Penitentiary. The Comptroller's Office has refused to approve for payment the medical expenses, basing said rejection on the foregoing opinion.

We have carefully studied the applicable statutes, together with the case of *Miller v. Douglas County*, 102 S.W. 996, referred to in your letter, and are of the opinion that the expenses involved are costs incurred on behalf of the defendants and may not be taxed against the state, or for that matter, against the county. As you know, Section 550.010 RSMo expressly provides that in the event of a conviction no costs incurred on the part of the defendant except costs for board may be paid by the state or county. Costs for medicine and medical attention are not costs of prosecution, but are incurred on the part of the defendant just as are costs for board. Board costs could not be paid but for the statutory exception. See also *Cramer v. Smith*, Mo. Sup., 168 S.W. 3d 1039, holding that the state is liable for costs of a transcript only because of the statutory language expressly requiring that such costs be taxed against the state or county. No such language appears in Section 221.120. It follows that the opinion of February 28, 1933, is correct and remains the opinion of this office.



Honorable Paul D. Hess, Jr.

With respect to the case of Miller v. Douglas County, we note that case involved a claim against the county by the person furnishing the medical services and medicines, and the Supreme Court held that the claim was properly denied. It is true that in the course of the opinion the Court referred to what is now Section 221.120, evidently because the plaintiff had cited that statute as justifying the allowance of his claim. The Court did not consider the question of whether the costs were or were not costs incurred on behalf of the defendant and that question was in no wise involved in the decision. What is said in reference thereto is at most dictum, but even the dictum does not purport to rule the specific question here presented.

For your information, we enclose herewith copy of the opinion of February 28, 1933. We also enclose copies of opinions dated October 12, 1938, to Richard Chamier, and October 26, 1949, to Percy W. Gullie. The latter opinions pertain to costs of hospitalization as distinguished from medical expenses as such, but we gather from the last paragraph of your letter that hospital expenses as well as doctor bills were incurred in the cases which are involved in your county. You will note that nothing in Section 221.120 refers to costs of hospitalization.

The enclosed opinion of October 26, 1949, refers to Section 4235 RSMo 1939, which provides in part that the county court, whenever satisfied of the necessity of so doing, may allow a moderate compensation for medical services furnished any sick prisoner, which shall be paid out of the county treasury. The opinion held that under such statute the county court was authorized to pay costs of hospitalization and medical services rendered an indigent prisoner. However, the 1949 revision session of the legislature amended that section (which is now Section 221.150 RSMo) by deleting the authority of the county court to allow compensation for medical services rendered prisoners.

Inasmuch as liability for payment of costs must be based upon express statutory provisions or necessary implication therefrom, we can find no basis upon which the state can be held liable for the medical expenses. So too, the county cannot be held liable absent statutory authority, either express or implied. The statute makes it the duty of the sheriff to procure the necessary medical attention. It is unfortunate that those who provided the necessary medical attention to the prisoners are without remedy against either the state or the

Honorable Paul D. Hess, Jr.

county and that they are unable to collect the expenses from the prisoners because of their indigency. However, this is a deficiency in the law which this office has no authority to supply.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosures (3)

JN:df/sj



January 20, 1965



Honorable Lloyd J. Baker  
Representative, Randolph County  
Route #3  
Moberly, Missouri

Dear Mr. Baker:

Your predecessor in office recently requested an opinion of this office concerning the sale of liquor by-the-drink in Moberly, Missouri.

The first question asked was whether the city council could limit the number of licenses to sell liquor by-the-drink. Section 311.090, RSMo, authorizing the sale of liquor by-the-drink provides that the applicant be qualified as follows:

"Any person who possesses the qualifications required by this chapter, and who meets the requirements of and complies with the provisions of this chapter, and the ordinances, rules and regulations of the incorporated city in which such licensee proposes to operate his business, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor . . . . by the drink . . . ." [Emphasis supplied.]

Thus a city may make ordinances, rules and regulations concerning the qualifications of an applicant for a license for the sale of liquor by-the-drink.

A city may not, however, prohibit the sale of intoxicating liquor within its boundaries by ordinance, rule or regulation, but may limit the number of licenses to sell liquor by-the-drink, if such limitation is not unreasonable, unjust or unduly oppressive or unfairly discriminating. See State v. Womach, Mo., 196 S.W. 2d 809, which held that a city may limit the number of original package liquor licenses. The reasoning in the case applies to a liquor by-the-drink license as well.

Honorable Lloyd J. Baker

-2-

The second question concerned the number of signatures required on the petition to call an election on the question of whether or not liquor by-the-drink shall be sold in a city. This question has been answered in an opinion to the Honorable Raymond H. Vogel, under date of June 25, 1951, which is enclosed.

Very truly yours,

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NORMAN H. ANDERSON  
Attorney General

Enclosure

OFFICERS:  
COUNTY TREASURER EX OFFICIO  
COLLECTOR:  
TOWNSHIP ASSESSOR:  
COUNTY BOARD OF EQUALIZATION:  
BOND:  
COMPATABILITY OF OFFICES:

There is no prohibition against a person who is presently township assessor and is also county treasurer ex officio collector-elect, from continuing his duties as township assessor until he assumes the duties as county treasurer ex officio collector. The bonds which must be given by a county treasurer ex officio collector in a county under township organization are the bonds required by Sections 54.070 and 52.020, RSMo Cum. Supp. 1963. A person who resigns as township assessor and then becomes county treasurer ex officio collector, is no longer a qualified member of the county Board of Equalization.

OPINION NO. 34 (1965)  
OPINION NO. 414 (1964)

January 20, 1965



Honorable Albert F. Turner  
Wright County Prosecuting Attorney  
Mountain Grove, Missouri

Dear Mr. Turner:

This opinion is given in response to your letter dated December 7, 1964, requesting advice from this office. Your letter reads as follows:

"In Wright County, we have a man elected treasurer ex officio collector who is presently the township assessor in Hart township.

"In your opinion, is this man qualified to retain the office of assessor until he actually assumes the office of treasurer? After he resigns as assessor and becomes treasurer, is he still qualified as a member of the Board of Equalization?

"We would also like to know how much bond this officer should be required to post."

We find no statutory provision prohibiting an individual from retaining the office of township clerk and ex officio assessor until he assumes the office of county treasurer and ex officio collector to which he has been elected.

Even when the duties of two offices are incompatible, the common law limitation in this regard only prohibits the holding of two or more incompatible offices at the same time. State ex rel. Gragg v. Barrett, 352 Mo. 1076, 180 S.W. 2d 730; Bruce v. City of St. Louis, 217 S.W. 2d 744. It is obvious that one does not hold office until one enters upon the discharge of the duties of such office. Thus, the common law prohibition would not apply in the case at point where the person who is presently township assessor does not enter the office of county treasurer ex officio collector until April 1 pursuant to Section 54.030, RSMo 1959.

The bonds required for a county treasurer ex officio collector in township organization counties are fixed by statute. Such a person occupies the status of a dual officer and as such, must give bonds covering the duties as county treasurer and as county collector. Section 54.070, RSMo 1959, fixes the county treasurer's bond at:

"\* \* \* not less than twenty thousand dollars nor more than the highest amount of money held by the treasurer at any one time during the year prior to his election or appointment, to be fixed and approved by the county court, \* \* \* provided, that the county treasurer in any county of the third class or fourth class may furnish either a personal bond or a surety bond and in case a surety bond is required by the county court in said county said surety bond shall be paid for by said county."

Section 54.330, RSMo 1959, provides that in a county under township organization, the county treasurer as ex officio county collector is required also to furnish bond as ex officio county collector under the general revenue law. Section 52.020, subparagraph 1, RSMo Cum. Supp. 1963, provides:

"Every collector of the revenue in the various counties in this state, \* \* \* before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, \* \* \* in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of the amount; but no collector shall be required to give bond in excess of seven hundred and fifty thousand dollars \* \* \*."

Since Wright County is a third class county, sub-paragraph 2 of this section would allow the county court of Wright County to:

"\* \* \* require the county collector to deposit daily all collections of money in the depositories selected by the county court in accordance with the provisions of sections 110.130 to 110.150, RSMo, \* \* \*. If daily deposits are required to be made, the county courts may also require that the bond of the county collector shall be in the sum equal to one-fourth of the largest amount collected during any one month of the year immediately preceding his election or appointment, plus ten per cent of the amount \* \* \*."

After the person in question resigns as township assessor and assumes the duties of the county treasurer ex officio collector, it is our opinion that he would no longer be a qualified member of the county Board of Equalization.

Section 138.010, sub-paragraph 1, RSMo 1959, provides:

"In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote, except in any county having township organization, the sheriff of the county shall also be a member of the board of equalization, and the township assessor shall sit as a member of the board of equalization when the assessment of his township is under consideration or review."

This section clearly sets out the persons qualified for membership on the county Board of Equalization, the county treasurer ex officio collector not being among those qualified.

#### CONCLUSION

It is, therefore, the opinion of this office that there is no prohibition against a person who is presently township assessor

Honorable Albert F. Turner      -4-


and who has been elected county treasurer ex officio collector from continuing his duties as township assessor until he assumes the duties as county treasurer ex officio collector.

The bonds which must be given by a county treasurer ex officio collector in a county under township organization are the bonds required by Sections 54.070 and 52.020, RSMo Cum. Supp. 1963.

A person who resigns as township assessor and then becomes county treasurer ex officio collector, is no longer a qualified member of the county Board of Equalization.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



OPINION NO. 37 (1965)  
OPINION NO. 420 (1964)  
Answered by Letter - Storts

February 25, 1965



Honorable Allen S. Parish  
Prosecuting Attorney  
Saline County  
Marshall, Missouri

Dear Allen:

On December 11, 1964, you sent us your request for an opinion as to whether the Recorder of Deeds may legally file or record an instrument where the notary public has not affixed an impression type seal to the acknowledgment but has affixed a rubber stamp seal.

The Circuit Court of St. Louis County in State ex rel. Lipsitz, et al., v. John Koob, Case No. 259700, Equity Division ordered the issuance of a writ of mandamus to compel the Recorder of Deeds to accept and record a deed in which the notary public's seal was a rubber stamp seal.

We agree with the conclusion reached by the Circuit Judge.

Very truly yours,

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NORMAN H. ANDERSON  
Attorney General

BS:df;mac

STATE MENTAL HOSPITALS: With respect to mentally ill persons,  
COUNTY COURTS: Sections 202.780 to 202.870, RSMo 1959:  
PROBATE COURTS:  
INSANE PERSONS: (1) Section 202.863 requires patients be  
INDIGENT PERSONS: classified as private or county patients  
and that county court hold hearing within  
ten days after notice by superintendent to determine indigency, sub-  
ject to review by circuit court; (2) Sections 202.220 and 202.240  
apply and permit redetermination by probate court of patient's pay  
status; (3) Section 31.050, RSMo Cum. Supp. 1963, requires superin-  
tendent to return patient to responsible party upon failure to pay  
support; (4) Hospital has no right of recovery against county for  
period pending determination of indigency; (5) Responsibility of  
other persons for care of patient pending determination of indigency  
depends on facts of individual case.

OPINION NO. 38 (1965)  
OPINION NO. 422 (1964)

June 7, 1965

George A. Ulett, M. D.  
Director  
Division of Mental Diseases  
722 Jefferson Street  
Jefferson City, Missouri



Dear Dr. Ulett:

This is in response to an opinion request initiated by Manson B. Pettit, M. D., Superintendent of the St. Joseph State Hospital, which states as follows:

"Where does responsibility lie for support of a patient if it takes a year or more to prove that patient is indigent and has been for a definite time but in retrospect has been cared for in a state hospital without any payment?"

We understand that this inquiry relates to admissions pursuant to Sections 202.780 to 202.870, RSMo 1959, entitled "Commitment and Hospitalization of Mentally Ill".

The patients admitted to the state hospitals under the provisions of this law shall be classified as private patients or county patients and any claim which the State may have for the hospitalization of said patients should be considered in light

of Section 202.863 (2), (3), RSMo 1959, which is as follows:

"2. When admission is sought for any person as a private patient, payment for care and treatment shall be made to the business manager of the hospital for thirty days in advance and a bond executed in sufficient amount to secure the payment for such care and treatment. No part of the advance payment shall be refunded if the patient is taken away within such period uncured and against the advice of the superintendent.

"3. If any person is admitted to a state hospital who is unable to pay for care and treatment, the superintendent of the hospital shall notify the county court of the county of residence of the fact and the county court shall hold a hearing on the case within ten days following the notification. If it is determined at the hearing that the person is unable to pay for care and treatment the county court shall order the hospitalization of the person as a county patient. Appeals from the decision of the county court may be taken in the manner provided in section 49.230, RSMo." (Emphasis ours).

The provisions of Section 202.863, Subsection 3, supra, makes it mandatory that the county court hold a hearing within ten days following the notification by the superintendent of the hospital alleging that the patient is indigent. The right of appeal is therein expressly stated and appeals may be taken in the manner provided in Section 49.230, RSMo 1959.

Further, it is noted that the probate court of the proper county has the authority to certify, by its order, that the status of a patient be changed from pay patient to county patient, or from county patient to pay patient. The relative Sections are as follows:

Section 202.220, RSMo 1959. "Pay patients become county patients -- when. If the probate court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any patient in a state hospital has not estate sufficient to support him therein. Upon the receipt of such certificate by the superintendent, such

person shall be a county patient of such county, and shall be supported by such county as provided by this law in the cases of poor patients."

Section 202.240, RSMo 1959. "County patients may become pay patients. If the probate court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients; and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this law in case of poor persons."

Thus, the proper probate court may enter an order changing the pay status of a patient, although the initial determination is within the jurisdiction of the county court as provided in Section 202.863 (3), (except when the person has been committed from St. Louis City). In our opinion, there is no inconsistency in the application of these statutes. Section 202.863 (3) does not provide that the county court shall retain jurisdiction but rather, makes it mandatory that the county court hold a hearing within ten days after proper notice and if it is determined at the hearing that the person is unable to pay for care and treatment, the county court shall order the hospitalization of the person as a county patient. If the county court does not make such a determination, the patient must be classified as a private patient. At that point, the responsibility of the superintendent is clearly stated in Section 31.050 (2), RSMo Cum. Supp. 1963. We quote:

"2. Whenever any person has been received as a patient of any such institution, and thereafter the county, municipality, guardian, trustee or person responsible for the support of such patient shall neglect or refuse to pay, within the time and in the manner required by law or the rules and regulations of the department of revenue, any installment required to be paid for the support of

the patient, it shall be the duty of the superintendent of the institution to return the patient to the sheriff of the county or municipality, or to the guardian, trustee or person responsible for the payment of the installment, and at the expense of the county, municipality, guardian, trustee or person."

There is no statutory authorization for recovery by the hospital from the county for the lengthy interim period which is the subject of this inquiry. The right of recovery, if any, by the hospital against any other parties is dependent entirely upon the circumstances of the individual cases. The obligation of the county to pay for the care and treatment of an indigent must be based upon such determination and order of the county court under Section 202.863 (3), or by appeal from the decision of the county court, in the manner provided in Section 49.230, or by action of the proper probate court consistent with the provisions of Section 202.220. We do not find that there is a conflict between Section 202.863 and Section 202.220. In reaching this conclusion, we follow the established rule that statutes must be reasonably construed and harmonized with existing laws not expressly repealed thereby or inherently repugnant thereto. We further note that the provisions of Section 202.863 (5), relating to payments by the county for the care of their indigent mentally ill persons, provide that such sums shall be paid in advance. There is no statutory provision which would allow recovery from the county for the period prior to the determination of indigency.

#### CONCLUSION

With respect to persons in state mental hospitals who are there under the provisions of the statutes for mental illness, Sections 202.780 to 202.870, RSMo 1959, it is the opinion of this office that; (1) Section 202.863 requires that such patients be classified as private patients or county patients and that the county court must hold a hearing and reach a determination on the question of indigency within ten days following notification by the superintendent of the hospital and, that said determination is subject to review in the proper circuit court as provided in Section 49.230; (2) Sections 202.220 and 202.240 also apply and permit redetermination by the proper probate court of the question concerning the pay status of a patient; (3) that Section 31.050 makes it clearly the duty of the superintendent of the state hospital to return the patient to the applicable party specified therein, in the event of a failure to pay the required support



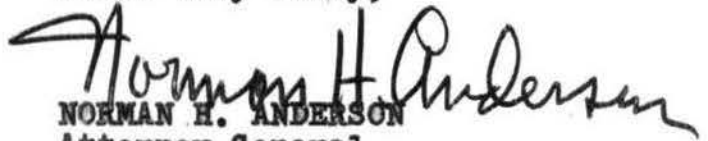
George A. Ulett, M. D.

-5-

obligation; (4) that the hospital has no right of recovery against the county for a lengthy period of care and treatment pending a determination of indigency; (5) that the responsibility of other persons for care and treatment of the patient during such lengthy interim period of care and treatment pending the determination of indigency must depend upon the facts of each individual case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



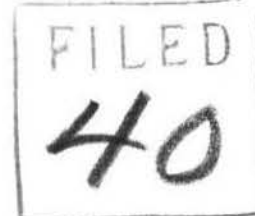
COUNTIES:  
COUNTY REVENUE:  
COUNTY FUNDS:  
INTEREST:

Interest paid by a bank for courthouse bond sinking fund deposits must accrue to the fund itself and cannot be used as general revenue by the county.

January 29, 1965

Opinion No. 40 (1965)  
425 (1964)

Honorable Don W. Owensby  
Prosecuting Attorney  
Dallas County  
Buffalo, Missouri



Dear Mr. Owensby:

This is in response to your request for an opinion wherein you inquire if interest earned by placing the courthouse bond sinking fund in time deposits may be regarded as general revenue to the county.

For the reasons stated below, we are of the opinion that interest so derived must accrue to the sinking fund for which it was paid.

Section 108.180, RSMo 1959 provides, inter alia, that the proceeds of each county bond issue ". . . and all moneys derived by tax levy, or otherwise, for interest and sinking fund provided for the payment of such bonds, shall be kept separate and apart from all other funds of such governmental unit, . . . nor shall such interest and sinking fund be used for any purpose other than to meet the interest and principal of such bonds; . . . " (Emphasis added).

Thus it is seen that money coming to the fund by taxation "or otherwise" must remain in the fund. Certainly this could be construed to include interest earned by depositing the fund in a bank. While the fund is there, interest is paid by the bank in exchange for the use of the money. If the interest is not deemed to accrue to the fund but is paid into the general revenue of the county then there would be a breach of the second part of the statute above quoted which says that the fund cannot be used for "any purpose other than to meet the interest and principal of such bonds."

In other words, to put the fund out at interest to earn money for the general benefit of the county or for some specific purpose such as building a bridge, etc., would be to use the fund for a purpose other than that for which it was intended - this is prohibited.

Honorable Don W. Owensby

The Supreme Court of Oklahoma has arrived at a similar conclusion in Roberts v. Board of Education, Okla., 33 P (2d) 496, 498.

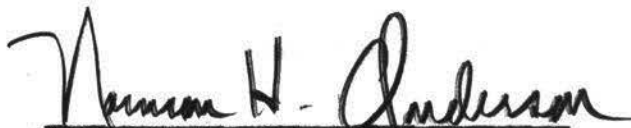
In Hays v. Isaacs, 120 SW2d 737, the Kentucky Court of Appeals held that such sinking funds are held in "... trust for the benefit of the holders of the bonds and must be administered with that object in view." We regard this as a sensible statement of an obvious truth. Such being the case then, surely, the fund could only be invested to earn money for its own retirement or some other purpose for which it was created.

#### CONCLUSION

Interest paid by a bank for courthouse bond sinking fund deposits must accrue to the fund itself and cannot be used as general revenue by the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Howard L. McFadden.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

NORMAN H. ANDERSON  
Attorney General

February 2, 1965



Honorable Robert Hoelscher  
Prosecuting Attorney  
Warren County  
Warrenton, Missouri 63383

Dear Mr. Hoelscher:

Your recent request for an opinion is in regard to an additional thirty-cent tax levy authorized by the voters of a school district at a special election held in the district on December 11, 1964. The tax book had already been extended by the county clerk and delivered to the county collector before this tax was authorized. You have informed us that there was not sufficient time to prepare a supplemental tax book and issue supplemental tax bills before December 31, 1964.

You ask two questions:

"May we have your opinion as to whether or not the taxpayers may, prior to December 31, 1964, tender to the Collector such additional taxes as may be assessed against them by virtue of the additional 30 cent levy, even though the supplemental tax bill has not been issued to them? In the event it is necessary for the taxpayer to wait until he has received his statement for the additional tax to pay it, will it then be necessary for the Collector to charge penalties and interest?"

A school district tax authorized on December 11, 1964, is a tax increase for the Year 1964, and the county clerk is required to enter this in a supplemental tax book. See Opinion of Attorney General No. 89, to Honorable Donald P. Thomasson, October 7, 1953, which is enclosed.

The county clerk is "to assess and carry out the amount so returned on the tax books of all taxable property, real and personal, of such school district" on receipt of the result of

the special election. Section 165.080, RSMo. There is no time limit specified within which this must be done. However, this must be done within a reasonable time, since the county clerk "on receipt thereof" of the result of the vote shall "proceed to assess and carry out the amount so returned on the tax books . . . ." "On receipt thereof" can only be construed to mean that the duty must be performed as soon after receipt as is reasonably possible.

You have informed us that this tax levy will not be placed in a supplemental tax book until after January 1, 1965, since such books have been ordered but will not arrive until after the first of the year.

If the tax is not placed in a supplemental tax book until after January 1, 1965, such tax will not become delinquent until January 1, 1966.

Personal property taxes "become delinquent on the first day of January following the day when said bills are placed in the hands of the collector". Section 140.730 (3), RSMo. Since the tax will not be on the tax books until after January 1, 1965, it follows that the collector will not have the bills in his hands until after January 1, 1965. Thus, the delinquent date for the personal property tax levy authorized by the special election shall be "the first day of January following the day when said bills are placed in the hands of the collector," that is, January 1, 1966.

Real estate taxes which are "unpaid on the first day of January, annually, are delinquent". Section 140.010, RSMo. However, taxes are not unpaid on the first of January if they are not on the tax books before that date. The collector is to make delinquent lists when he is "unable to collect any taxes specified on the tax book". Section 140.030, RSMo. Of course, any taxes not specified on the tax book do not require delinquent lists to be made and are not delinquent taxes under the statutes.

We find nothing in Article X, § 3, Missouri Constitution of 1945, which impels a different result.

Honorable Robert Hoelscher      -3-

Your question concerning prepayment of the taxes has become moot since December 31, 1964, has passed and since we have concluded that the taxpayer will not be required to pay penalties and interest until the tax becomes delinquent on the first day of January, 1966.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

February 11, 1965



Honorable Lloyd J. Baker  
State Representative  
Randolph County  
Moberly, Missouri

Dear Representative Baker:

This letter is in answer to the request of former Representative Herman G. Kidd at the behest of Ronald Windsor, Recorder, for an opinion of this office on the following matter:

"Does a Commissioners report which is asking for the approval of the Court, constitute in itself a change of title requiring the County Recorder to give description to assessor for re-assessment?"

We understand that the term "commissioners' report" means the report of commissioners in a condemnation proceeding in connection with the duty of the county recorder under Section 137.117, RSMo 1959. That section requires the county recorder to furnish to the assessor before the 15th day of the month a description of all real estate transfers completed during the preceding month. The question is whether the filing of a commissioners' report in condemnation proceedings constitutes a change of title requiring the county recorder to give a description of the land involved to the assessor.

Condemnation proceedings are governed by Chapter 523, RSMo 1959, and Supreme Court Rule 86. Rule 86.06 reads:



"The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation. The value of the property being condemned and all benefits and damages shall be assessed by said commissioners as of the date the condemnation petition is filed, but if the award of said commissioners has not been paid to the defendants, or to the clerk of the court for said defendants, within one year after said commissioners' award is filed, any subsequent assessment of values, benefits and damages shall be as of the date of such subsequent assessment. Said commissioners, after having viewed the property, shall forthwith return, under oath, to the clerk of such court their report in duplicate setting forth, and stating separately as to all property held under the same ownership, (1) the amount of net damages, if any, together with (2) a separate description of the property for which the damages are assessed, and the clerk shall file one of said copies in his office and cause the other to be delivered to the recorder for the county where the property lies, who shall record the same in his office and shall enter in the abstract and index of deeds at the proper place in the grantor's column the respective names of the first persons alleged to claim, or through whom is claimed some title to each of such respective separately described properties, and the fee for said recording shall be taxed by the clerk as costs of the proceedings. When condemnation proceedings are brought in connection with a project to supply water to any city, town or village, the commissioners or jury shall inquire, and make report as to the value of the use of the stream, or the diversion of the waters thereof, to the extent to which the plaintiff proposes to use it, or to divert them, or what

damage will be done by the erection and maintenance of any dam or buildings which it is proposed to erect and maintain in connection with aforesaid supplying of water, specifically stating to whom and upon what account damages are awarded. When private property is appropriated by a municipality for any public place or use, resulting benefits shall be assessed against the municipality for the amount of the benefit to the public generally and the balance of the benefits shall be assessed against the owner or owners having land within the benefit limits set by the municipality, which land shall be especially benefited by the proposed improvement, to the proportion that each lot of said owners shall be benefited. Upon making payment to the clerk of the amount assessed, for the party or parties in whose favor such damages have been assessed, it shall be lawful for the condemner to take possession and hold the interest in the property so appropriated for the uses aforesaid; and, upon failure to pay the assessment aforesaid within ten days after it becomes final, or, in the case of a municipality, within thirty days thereafter, the court may upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the condemner shall, within said ten or thirty-day period, elect to abandon the proposed appropriation of any property, by an instrument in writing to that effect, to be filed with the clerk of such court, and to so much as is thus abandoned the assessment of damages shall be void. If such appropriation be so abandoned as to any property, proceedings for the condemnation of the same property shall not be instituted again within two years after such abandonment. The report of the commissioners, when signed by two of said commissioners, shall be taken and considered as the report of all."

Similar provisions are set forth in Section 523.040, RSMo 1959. According to the statute and the rule, a condemnor has the right to abandon the proceeding at any time within ten days after the first assessment by the commissioners, or ~~if~~ the court awards a new assessment, within ten days after the final assessment

Honorable Lloyd J. Baker

-4-

by subsequent commissioners or by jury. If the condemnor is a municipality, a period of thirty days is allowed within which to abandon the proceeding. Center School District No. 58 of Jackson County v. Kenton, Mo. Sup. 345 SW2d 120.

Rule 86.08 provides for a trial on the issue of the amount of compensation to be paid by the condemnor in the event that anyone with an interest in the land files written exceptions to the report of the commissioners within ten days after the service or posting of the required notice of the filing of the commissioners' report.

In the case of Kennet & O Railroad Company v. Senter, 83 Mo. App. 181, it was held that the paying into court of the award of commissioners or of a jury completes the appropriation of the land. This case has been followed by many later decisions, including the recent case of City of Jefferson vs. Capital City Oil Co., Mo. App. 286 SW2d 65.

However, the case of State ex rel. State Highway Commission vs. Deutschman, et al., Mo. Sup. 142 SW2d 1025, held that the condemnor could abandon property even after payment of the award into court, provided that such condemnor had not taken possession of the land.

Therefore, a commissioners' report in condemnation does not, in itself, constitute a change of title requiring the county recorder to give to the assessor a description of real estate transfers completed as contemplated by Section 137.117.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj/kd

ANSWERED BY LETTER

Opinion No. 45  
ABL (Eichhorst)

February 11, 1965

FILED

45

Mr. Larry R. Gale  
Acting Director  
Missouri Conservation Commission  
Highway 50 West  
Jefferson City, Missouri

Dear Mr. Gale:

This is in answer to your recent request for an opinion of this office as to whether or not the Conservation Commission could agree to provision C-18 of a Project Agreement for Construction of Structural Measures by Contract with the United States Department of Agriculture Soil Conservation Service.

Provision C-18 provides that the Missouri Conservation Commission, as the Contracting Local Organization, will "Hold and save the Service free from any and all claims for injury to persons or damage to property that may arise from this agreement or the construction contract".

We can find no constitutional or statutory provision which authorizes the Missouri Conservation Commission to so contract. Article IV, Section 43 of the Missouri Constitution of 1945, controls the use of revenues and funds of the conservation commission and reads as follows:

"The fees, moneys, or funds arising from the operation and transactions of the commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the state and from the sale of property used for said purposes, shall be expended and used by the commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of the state, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto, and for no other purpose."

It is to be noted that there is no statement therein authorizing the use of those funds to pay any such claims contemplated by the proposed contract, and that this section expressly provides that the funds are to be used for the stated purposes, "and for no other purpose".

The State has not consented that the Conservation Commission be liable for torts. A copy of an official opinion of this office of July 26, 1939, to the Honorable I. T. Bode, relating to the State Park Board is attached. Thus, a priori, if a state agency, such as the Commission itself, is immune from tort liabilities it could not contract to assume the tort liabilities of another agency.

Therefore, it is the opinion of this office that the Missouri Conservation Commission cannot agree to provision C-18 of the proposed agreement.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TEE/dg

BOARD OF REGENTS:  
QUASI - PUBLIC CORPORATION:  
SOVEREIGN IMMUNITY:  
STATE COLLEGE:

The use, occupancy and operation of dormitories for students not for profit by a state college is a governmental function of that institution and the Board of Regents of the said college

is a quasi-public corporation and therefore the proper subject of sovereign immunity to liability in the same degree afforded the State.

OPINION NO. 52

April 19, 1965



Mr. E. C. Curtis  
Farrington and Curtis  
Attorneys at Law  
1016 Landers Building  
Springfield, Missouri 65806

Dear Mr. Curtis:

This is in reply to your opinion request in which you state:

"The Board of Regents for the Southwest Missouri State College has requested us, as attorneys for the College, to obtain your official opinion with regard to the liability of the College for tort claims arising out of the use, occupation and operation of dormitories presently being constructed by the College. These dormitories are being financed by the sale of revenue bonds under the provisions of Chapter 176, R.S.Mo. 1959. The dormitories will, of course, be occupied by students, and the occupation charges paid by the students will be used to pay the revenue bonds."

The specific question on which the opinion is requested is as follows:

". . . the liability of the College for tort claims arising out of the use, occupancy and operation of dormitories presently being constructed by the college."

Your opinion request further states that the dormitories are to be occupied by students. We assume that students of no other school or institution will be allowed to occupy the dormitories.



Educational institutions established by the authority of the State have long been considered to be an agency of the State and heir to the same sovereign immunity to liability. Cochran v. Wilson, et al., 287 Mo. 210, 229 SW 1050 (1921).

Article IX, Section 9(p) of the Missouri Constitution contains provisions for establishing schools other than the State University. That provision states:

"The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary."  
(Underscoring ours.)

In addition to the constitutional provision authorizing other educational institutions, Chapter 174, RSMo, directly provides for five state colleges which includes Southwest Missouri State College. Chapter 174, RSMo also provides for a board of regents to govern the state college so established. A Board of Regents empowered under 174.040, RSMo, is a quasi-public corporation. Koch v. Board of Regents of Northwest State College, et al., Mo., 256 S.W.2d 785 (1953).

The courts have consistently held that public and quasi-public corporations have sovereign immunity. Todd v. Curators of the University of Missouri, 347 Mo. 460, 147 S.W.2d 1063 (1941). In defining and applying the public or quasi-public corporation theory to a case founded in negligence against a state school the Todd case, supra, stated (l.c. 1064):

"By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes - a state university."

A like analysis was stated in the Koch case, supra, concerning the Board of Regents of Northwest Missouri State College. The court in the Koch case stated (l.c. 78):

"Under section 174.040, RSMo the Board (of Regents) is a legal entity or a quasi-public corporation . . ."

Since Northwest State College and Southwest State College are common subjects of the above statute, the quote from the Koch

case, supra, is applicable to Southwest Missouri State College Board of Regents.

The statutory provision of 174.040, RSMo gives the board of regents the power to "sue and be sued". This provision is not a statutory waiver of sovereign immunity. The effect of such provision was discussed in the Todd case, supra, and the court stated (l.c. 1064):

"A statutory provision that such a public corporation 'may sue or be sued' does not authorize a suit against it for negligence."

#### CONCLUSION

It is therefore the opinion of this office that Southwest Missouri State College Board of Regents is a quasi-public corporation entitled to sovereign immunity as a state agency established for educational purposes and as such is immune to liability for negligence arising out of the use, occupation and operation of dormitories constructed for the purpose of housing students of the said college not for profit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William A. Peterson.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

February 2, 1965



Honorable Alfred A. Speer  
Representative, 12th District  
St. Louis County  
Room 201, Capitol Building  
Jefferson City, Missouri

Dear Representative Speer:

You have requested an official opinion of this office upon a question forwarded to you by the City of Glendale which has been expressed as follows:

"If a fourth-class city (which of course is Glendale) adopts a pension plan for the police and firemen under provisions of Section 86.580, and following Missouri Revised Statutes, and then later consolidates with another fourth-class city under the provisions of Section 72.150, and following Revised Statutes of Missouri, would it be necessary for the consolidated municipality to re-submit the pension plan to the voters, or would the pension plan carry over for all of the police and fire employees of the new city without further vote."

Section 86.583, RSMo. 1959, provides:

"Any municipality in any county of the first class, and any other municipality in this state which now contains or may hereafter contain not more than one hundred thousand inhabitants nor less than three thousand inhabitants as determined by the last preceding federal census is hereby authorized to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of deceased members; provided, however,

that nothing in this section shall be construed to affect any pension or retirement system for members of an organized police force or fire department, and their widows or minor children, which has been established previously under authority of an act of the general assembly and which is in operation at the time of the passage of this section, and the provisions of law applicable to any such pension or retirement system shall not be deemed to be repealed or superseded by the provisions of this section. This section shall not take effect in any such city until approved by the voters thereof as herein provided. On order of the city council, or on petition of five per cent of the qualified voters of said city, the city clerk shall publish notice thereof and submit to the qualified electors of said city at the next general or municipal election the question: 'Shall the police or firemen's pension plan be approved?' If a majority of the voters casting votes thereon at the election is in favor of the question, this section shall take effect in said city thirty days after the election. Notice of every such election under this section shall be published at least once a week for at least three weeks in a newspaper of general circulation in said city the last publication to be not more than three nor less than two weeks next preceding the election."

Under this section, a city in a county of the first class, such as Glendale, and other cities mentioned in the act, may adopt a pension plan for policemen and firemen by a majority vote at an election held for the purpose of approving or disapproving such plan. We think that a pension plan pursuant to this section would necessarily be in the form of an ordinance.

Sections 72.150 through 72.205, RSMo. Cum. Supp. 1963, govern the consolidation of municipalities of the class that includes Glendale. Consolidation of two or more such municipalities may be initiated by a consolidation ordinance adopted by each of the municipalities to be consolidated or by a petition for consolidation. Sections 72.155 and 72.163 provide that a consolidation ordinance or a petition for consolidation may contain, among other enumerated matters:

"\* \* \* the details of transition, such as which officers will serve, which employees shall be retained, what taxes will be collected, what ordinances will be in effect and similar matters for the operation of the consolidated municipality until the new governing body provides otherwise \* \* \*."  
(Emphasis ours)

The sections state that such details of transition may be included in the ordinances or petition but are not required.

If a municipality adopts a pension plan pursuant to Section 86.583 supra and subsequently consolidates with another municipality pursuant to Section 72.150 et seq. supra, and there is included in the consolidation ordinances or petition for consolidation, a provision that the pension plan shall remain in effect, it is our opinion that such provision in the ordinances or petition would be valid and if the consolidation were effected according to the terms of the statutes governing consolidation pursuant to such ordinances or petition, then the new municipality formed by the consolidation would be covered by the pension plan, without further vote. The pension plan would fall within the classification described in the words of Sections 72.155 and 72.163, "what ordinances will be in effect," above quoted.

On the other hand, if the consolidation ordinances or the petition for consolidation did not contain a provision continuing the pension plan in effect, there is another method whereby the plan could be adopted in connection with consolidation.

Section 72.185 reads:

"In the event that the proposition as voted upon does not contain the name and form of government of the proposed consolidated municipality and the details of transition, such as which officers will serve, ~~which~~ employees shall be retained, what taxes will be collected, what ordinances will be in effect and similar matters for the operation of the consolidated municipality until the new governing body provides otherwise, then the governing body of each affected municipality shall select five commissioners to meet with similar commissioners appointed from the other affected municipalities, the commissioners to study



and recommend an appropriate name and form of government of the consolidated municipality and the details of the transition. The commissioners shall recommend the name and form of government of the consolidated municipality and the details of the transition, which shall be voted upon in separate elections in each of the affected municipalities, and, if the proposition fails to pass by a simple majority in both or all of the same affected municipalities, a new charter commission shall be appointed which shall submit a second recommendation to the voters for election. If the second recommendation as to name and form of government and the details of the transition shall also fail to pass by a simple majority, the results of the two elections shall be compared and the proposition receiving the highest total number of votes in favor thereof shall be considered as having passed by a simple majority." (Emphasis ours.)

Under this section the pension plan would be in effect upon consolidation if the recommendation of a charter commission is adopted by the voters pursuant to Section 72.185 containing a provision that the ordinance providing for such plan would remain in effect.

If neither the consolidation ordinances, the petition for consolidation nor the commissioners' recommendation contain any provision for the continuation of the pension plan, the ordinance embodying the plan is no longer in force once consolidation is effected. In this situation, a new plan could be adopted by the new municipality pursuant to Section 86.583, RSMo 1959.

It is the opinion of this department that a pension plan for policemen and firemen adopted by a municipality pursuant to Section 86.583, RSMo 1959, may be continued in effect upon the consolidation of such municipality with another municipality by providing in the consolidation ordinances, petition for consolidation or commissioners' recommendation that the ordinance embodying such plan shall be continued in effect, and that otherwise, that ordinance embodying such plan would no longer be in effect upon consolidation.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



CRIMINAL LAW:  
PUBLIC RECORDS:

Reports of criminal investigations and statements of suspects or defendants in criminal cases in the possession of the prosecuting attorney are not public records and need not be open for public inspection. However, a prosecuting attorney may, in his discretion, permit such inspection as he deems advisable.

OPINION NO. 56

February 2, 1965

Honorable Allen S. Parish  
Prosecuting Attorney  
Saline County  
P. O. Box 427  
Marshall, Missouri



Dear Mr. Parish:

We have your letter of January 12, 1965, requesting an opinion of this office. Your questions may be paraphrased as follows:

1. Are investigative reports in general, and particularly written or otherwise recorded statements of suspects in criminal cases, matters of public record which must be open for inspection by the general public?
2. If these items are not required to be open for public inspection, may the prosecutor permit them to be inspected by newsmen or others?

With reference to your first question, Section 109.180, RSMo 1963 Cum. Supp. provides in part as follows:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen."

A misdemeanor penalty is provided for any official who fails to observe the quoted provision, and Section 109.190, RSMo, 1963 Cum. Supp. guarantees the right to photograph or otherwise copy any records included under Section 109.180.

A close examination of the many statutes relating to prosecuting attorneys and to criminal prosecutions generally shows that there is no statute requiring the prosecuting attorney to keep such records as the kind you describe. While it is obvious that in the preparation of the state's case, the prosecutor will necessarily collect all such investigative matter as may be needed for use in trial, it does not follow that these materials are "kept pursuant to statute" within the meaning of Section 109.180. This being the case, that section does not apply and the right of inspection guaranteed therein does not extend to these records and reports.

Moreover, an exception to the common-law right of inspection of records by the public has consistently been recognized with regard to investigative data gathered by police and prosecuting officials. In *International Union v. Gooding*, 251 Wis. 362, 29 N.W. 2d 730, 736, the court said:

"We shall not go into the scope of the common-law right exhaustively or attempt to document our observations upon it. It is enough to say that there are numerous limitations under the common law upon the right of the public to examine papers that are in the hands of an officer as such officer. Documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action ordered sealed by the court are typical. The list could be expanded but the foregoing is enough to illustrate that in certain situations a paper may in the public interest be withheld from public inspection. \* \* \*"

The same principle was stated in *Lee v. Beach Publishing Co.*, 127 Fla. 600, 173 So. 440, 442, as follows:

"The appellant contends that there are certain records in the police department of a city which must be kept secret and free from common inspection as a matter of public policy. This is true. The rule as stated in 23 R.C.L. 161, is as follows:

'The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free

from common inspection, such for example as diplomatic correspondence and letters and despatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals.'"

We, therefore, conclude that statements of suspects or defendants in criminal cases are not "public records" which are subject to inspection by the general public either under Section 109.180 or under common law. It is further our view that the confidential character of these matters remains unchanged after the trial of the case has been concluded. Naturally, anything that has been disclosed at trial becomes a part of the record of the trial and, therefore, a public record.

You further inquire whether the prosecutor may permit such items to be examined by representatives of the news media or other members of the general public. Whether or not such matters shall be made public lies in the sole discretion of the prosecuting attorney. As we have previously stated, he is not required to make them open for inspection. However, he may do so if he sees fit.


There are no precise statutory or constitutional guides governing the extent to which a prosecutor may make public the contents of defendant's statements prior to trial. We would suggest that you be guided by the applicable section of the Legal Canons of Ethics, Supreme Court Rule 4.20. On this general subject, you might also consult two recent decisions of the United States Supreme Court in which convictions were reversed for reasons relating to an inflamed public opinion resulting from pre-trial publicity, *Irvin v. Dowd* 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751; *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663.

#### CONCLUSION

Reports of criminal investigations and statements of suspects or defendants in criminal cases in the possession of the prosecuting attorney are not public records and need not be open for public inspection. However, a prosecuting attorney may, in his discretion, permit such inspection as he deems advisable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,

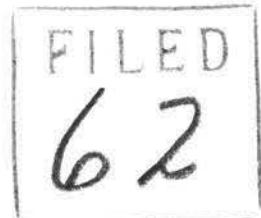
  
NORMAN H. ANDERSON  
Attorney General

LIQUOR CONTROL:  
BONDS:

Agents, assistants, deputies and inspectors of the Department of Liquor Control may be bonded under a blanket bond in the sum of \$5,000.00 for each agent, assistant, deputy and inspector.

OPINION NO. 62

January 19, 1965



Mr. John Vaughn  
State Comptroller  
State Capitol Building  
Jefferson City, Missouri

Dear Mr. Vaughn:

You have informed this office that the agents of the Department of Liquor Control have individual bonds for the faithful performance of their duties and the safekeeping and accounting of money and property received by them. You have further informed us that a substantial amount of money could be saved by the state by the purchase of a blanket bond to cover all said liquor agents. You requested our opinion as to whether or not the state would be authorized to purchase a blanket bond to cover all agents of Liquor Control.

The agents, assistants, deputies and inspectors of the Department of Liquor Control are required to give bond in the sum of \$5,000.00 for the faithful performance of their duties and for safely keeping an accounting of moneys and property received by them under Section 311.620, subsection 3, RSMo. The pertinent part of the statute reads as follows:

"The agents, assistants, deputies and inspectors \* \* \* shall each give bond to be approved by the supervisor of liquor control for faithful performance of the duties of their respective offices and to safely keep and account for all moneys and property received by them. This bond shall be in the sum of five thousand dollars, and the cost of furnishing all such bonds shall be paid by the state."

While the statute requires that each agent, assistant, deputy and inspector give bond in the sum of \$5,000.00 and -

Mr. John Vaughn

-2-


that the state pay for the cost of such bond, the use of the term "each" does not necessarily require the giving of an individual bond by each agent. The purpose of the statute is to protect the money and property coming into the hands of the agents and to guarantee faithful performance of their duties. This purpose may be achieved equally well by a blanket bond covering all agents if said bond provides coverage for each agent individually in the sum of \$5,000.00. The fact that such blanket bond would cost the state less money than individual bonds further serves public policy and recommends the blanket bond in preference to individual bonds.

#### CONCLUSION

Therefore, it is the opinion of this office that agents, assistants, deputies and inspectors of the Department of Liquor Control may be bonded under a blanket bond in the sum of \$5,000.00 for each agent, assistant, deputy and inspector.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jeremiah D. Finnegan.

Very truly yours,



NORMAN H. ANDERSON  
Attorney General

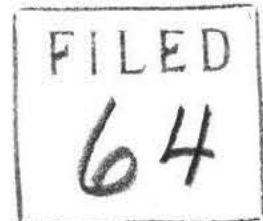


MILK PRODUCTS: The phrase "not requiring refrigeration" as  
HEALTH PURPOSES: used in Section 196.932, RSMo. Cum. Supp.  
1963, refers to milk products not requiring  
refrigeration for public health or sanitation  
purposes.

OPINION NO. 64

April 5, 1965

Dr. H. M. Hardwicke, M.D.  
Acting Director  
Division of Health  
Jefferson City, Missouri



Dear Dr. Hardwicke:

Your request for an official opinion dated January 13,  
1965, reads as follows:

"It is respectfully requested an opinion be  
rendered in regard to the following. Chap-  
ter 196, Section 196.932 reads as follows:

"The provisions of Sections 196.930  
to 196.962 do not apply to manufac-  
tured dairy products, including, but  
not limited to butter, condensed milk,  
evaporated milk, sterilized milk or  
milk products not requiring refrigera-  
tion, all types of cheese, or to nonfat  
dry milk, dry whole milk or part fat  
dry milk unless used in the preparation  
of fluid milk or fluid milk products."

"A heavy cream is entering Missouri from out-of-  
state sources which, according to the manufactur-  
er's label, requires refrigeration. The manu-  
facturer states that refrigeration is required  
to maintain stability of the product and to pre-  
vent butterfat separation from other constituents  
of the product. The manufacturer maintains that  
refrigeration is not required to prevent bacterial  
decomposition since the product is sterilized and  
is aseptically packaged after sterilization.

"Does the fact that this product requires refrig-  
eration to maintain product stability place it in  
the graded fluid milk category as defined in  
Chapter 196, Sections 196.930 to 196.962?"



Dr. H. M. Hardwicke, M.D.

Section 196.932, quoted above, is applicable to the question which you have submitted. We have found no court case interpreting it. The determination of whether the product actually requires refrigeration for health or sanitary purposes must be made by the Division of Health since this is a matter of fact. Reliance cannot be placed wholly upon the manufacturer's representation or upon the statements appearing on the label on the product. It is the duty of the Division to determine this matter of fact by its own investigation. However, we are of the opinion that the phrase "not requiring refrigeration" as used therein, refers to milk products not requiring refrigeration for public health or sanitation purposes. It does not refer to requirements imposed by the manufacturer, himself, for marketing purposes not related to health and sanitation.

Our reason for reaching this conclusion is based on the established rules of statutory construction holding that statutes should be given their plain obvious meaning and this meaning may be ascertained by inquiring as to the basic purposes of the statute involved. The applicable doctrine is stated in Sutherland Statutory Construction, Volume 3, Section 5505, as follows:

" . . . cases within the reason, though not within the letter of a statute shall be embraced by its provisions; and cases not within the reason, though within the letter shall not be taken to be within the statute."

Milk control statutes, where otherwise valid, have been uniformly upheld by the courts in order to accomplish sanitary and public health objectives. In Sutherland Statutory Construction, Volume 3, Section 7202, we find the following statement of this well-settled doctrine:

"Milk control legislation providing for the licensing of milk dealers, and the regulation of prices has also received wide adoption. This legislation, enacted for the purpose of maintaining an adequate and wholesome supply of milk fit for human consumption receives a liberal interpretation. The same treatment should be accorded laws providing for the inspection of cattle to determine the presence of contagious disease."

Dr. H. M. Hardwicke, M.D.

If you have determined that the product does not require refrigeration for health purposes, then this statute is not applicable.

#### CONCLUSION

Therefore, it is the opinion of this office that Sections 196.930 to 196.962, RSMo. Cum. Supp. 1963, do not apply to sterilized milk or a milk product which does not require refrigeration in order to maintain it in a healthful and sanitary condition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CRIMINAL LAW:  
POOL HALLS - TABLES:

Participants in a "Jamboree," a 20 game pool or billiard contest wherein participants receive prize money obtained from a \$10.00 entry fee which is distributed in proportion to the number of games won, are in violation of Section 563.390, RSMo 1959, which forbids playing pool for money.

OPINION NO. 68

April 6, 1965

Honorable William D. Kimme  
Prosecuting Attorney  
Franklin County  
Union, Missouri



Dear Mr. Kimme:

This is in answer to your inquiry as to whether it is a violation of Section 563.390, RSMo 1959, when there is a "Jamboree" or billiard game contest conducted under the factual situation described in your letter.

In your letter you state that a "Jamboree" is a contest conducted by proprietors of pool halls wherein individuals pay an entry fee of \$10.00. These fees are held by the proprietor until 20 games of pool are played. When the 20 games are completed, each player is entitled to receive as prize money a share of the entry fees to be determined by the total amount of money paid in and the number of games that an individual might win. All money paid in as entry fees is returned to the players. No money is held by the proprietor. You do not state who pays the proprietor for the cost of the games.

Section 563.390, RSMo 1959, provides as follows:

"It shall be unlawful for any person to play for money or purses of money at any billiard game, pool game or any other game played upon a table and upon which balls and cues are used, or to bet any money on any game named herein which others may be playing. Every person violating the provisions of this section shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by a fine or not less than ten dollars nor more than two hundred dollars."

Honorable William D. Kimme

Each entrant in a "Jamboree" must pay a fee to enter the contest. The sum of these fees constitute a money-prize of which each individual strives to win as large a share as possible by his skill at playing pool. By his participation, each contestant is unquestionably playing pool or billiards for money within the meaning of Section 563.390, RSMo 1959. It is our opinion the contestants therein are in violation of Section 563.390, RSMo, by playing pool for money.

CONCLUSION

It is the opinion of this office that participants in a "Jamboree," a 20 game pool or billiard contest wherein participants receive prize money obtained from a \$10.00 entry fee which is distributed in proportion to the number of games won, are in violation of Section 563.390, RSMo 1959, which forbids playing pool for money.

This opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

JHD:bf

July 1, 1965

FILED

69

Mr. James L. Paul  
Attorney at Law  
Pineville, Missouri

Dear Mr. Paul:

This is in reply to your request for an opinion concerning the right of a bailbondsmen to require that a prisoner employ a particular lawyer as a condition of the bail agreement.

We find nothing which specifically prohibits the bondsman from making this requirement. However, the lawyer involved could be said to have violated the Canon of Ethics on the subject (Supreme Court Rule 4.28) and, because the bondsman is a participant or conspirator in that violation, he could not be said to be a "reputable person" as defined in the attached prior opinion of this office (to Honorable William A. Collet, February 15, 1961).

Since Supreme Court Rule 32.14 requires that a bailbondsmen be a "reputable person", the individual you describe could not qualify.

Very truly yours,

HLM:mje

NORMAN H. ANDERSON  
Attorney General

Enclosure

SCHOOLS:  
SCHOOL DISTRICTS  
STATE BOARD OF EDUCATION:  
SCHOOL ANNEXATION:

Section 165.300, RSMo Supp. 1963, (after July 1, 1965, renumbered as Section 162.441) does not require approval by the State Board of Education of a school district annexation where the districts adjoin.

OPINION NO. 71

February 5, 1965



Honorable Charles G. Hyler  
Prosecuting Attorney  
County of St. Francois  
Courthouse  
Farmington, Missouri

Dear Mr. Hyler:

This opinion is issued in response to your request of January 18, 1965. You inquire:

"Does Section Five of 165.300 [RSMo Supp. 1963] require the State Board of Education to give written approval of the proposed annexation by the Desloge School District to the Bonne Terre School District before they can proceed with an election concerning this matter."

Subsection (5) of Section 165.300, RSMo Supp. 1963, states as follows:

"Any school district may annex to any high school district in the county in the manner provided by this section if, prior to the time the proposition is submitted to the voters of the district, the annexation is approved in writing by the state board of education."

The words "any school district" seemingly indicate that Subsection (5) applies to all school districts and hence one might conclude that all annexations must be approved by the State Board of Education. However, a reading of the full statute and a knowledge of the prior revision of this statute manifests the error of such a conclusion.

Section 165.300 as amended in 1963 has five subsections. Subsection (1) provides:



"Whenever an entire school district, or a part of a district, whether in either case it be a common school district, or a city, town, or consolidated school district, which adjoins any city, town, consolidated or village school district, including districts in cities of seventy-five thousand to seven hundred thousand inhabitants, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting or special election for said purpose by giving notice as required by section 165.200; \* \* \* " (Emphasis added)

Subsection (2) provides for the certifying of the election results and the approval of the receiving district.

Subsection (3) provides for the transfer of property.

Subsection (4) provides for the form of ballot.

These first four subsections existed (with slight variation not material here) in Section 165.300 prior to the 1963 amendment. In 1963 Subsection (5), quoted supra, was added.

(Note that Section 165.300 will be renumbered after July 1, 1965, as Section 162.441.)

Subsection (1) authorizes any school district to annex to any six-director district which adjoins. Prior to 1963 it was held by the courts that the requirement that the districts adjoin was mandatory. See: Willard R-2 v. Springfield R-12, 241 MoApp 934, 248 SW2d 435, 442-443.

Section 165.300(1), prior to the 1963 amendment, authorized all districts to annex to an adjoining six-director district. The receiving district might or might not be one maintaining a high school. The annexing districts might be in different counties. No approval of the State Board was required. The amendment of 1963 did not change the provisions of Subsection (1) so far as material here.

Subsection (5), added in 1963, authorizes districts to annex only if: 1) the receiving district maintains a high school;

Honorable Charles G. Hyler

2) both districts are in the same county; 3) the State Board approves. No requirement is made that the districts adjoin.

The word "adjoin" is the key. Where districts adjoin, they may annex as provided by Subsections (1) - (4). Where the districts do not adjoin, they may annex only if they meet the three additional requirements of Subsection (5).

As to your particular inquiry, if the school districts adjoin, they may annex without the approval of the State Board of Education; if they do not adjoin, Board approval is required.

The State Board of Education informs us that it has construed Section 165.300, both before and after the 1963 amendment, in accord with our conclusion here.

We are informed that the Desloge and Bonne Terre School Districts do adjoin. Thus, these districts may annex under Section 165.300 without approval of the State Board of Education.

#### CONCLUSION

Therefore, it is the opinion of this office that Section 165.300, RSMo Supp. 1963, (after July 1, 1965, renumbered as Section 162.441) does not require approval by the State Board of Education of a school district annexation where the districts adjoin.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

INCOME TAX:  
TAXATION:  
INTEREST:

There is no constitutional provision prohibiting the Legislature from paying interest on income tax refund claims which arose during the year 1964 but which remain unpaid because of an insufficient appropriation.

February 2, 1965

OPINION NO. 72

Honorable Bernard Simcoe  
Representative, Callaway County  
Room 306B  
Capitol Building  
Jefferson City, Missouri



Dear Representative Simcoe:

On January 19, 1965, Mr. F. E. Robinson wrote a letter to this office on your behalf. In his letter, and subsequent telephone conversations on this subject, Mr. Robinson said that the House Appropriation Committee was considering an appropriation bill to allow the payment of income tax refunds which should have been paid by the State of Missouri during the year 1964 but were not because of an insufficient appropriation by the 72nd General Assembly. Mr. Robinson asks whether there are any constitutional limitations or restrictions upon the Legislature, preventing them from allowing interest on these unpaid tax refunds when they are paid this year.

We have been informed that the bill authorizing such an appropriation is to be amended. The taxpayers who are to receive interest on their refunds are to be classified as those whose claim for refund of income tax arose during the calendar year 1964 but who failed to receive their refund payment because the money appropriated for this purpose was depleted. The exhaustion of funds took place on or about August 1, 1964.

We have concluded that there is no constitutional prohibition preventing the Legislature from granting interest on income tax refunds which come within the above described classification. We will first discuss those portions of the Missouri Constitution which we have considered and will then analyze certain statutory provisions applicable to this subject.

Article III, Section 38(a)

This section says that the General Assembly has no power to "grant public money" or "lend public credit" to any private person, except under certain specified situations. The type of grants prohibited by this section are "gratuitous grants", State ex rel Kelly v. Hackmann, 275 Mo. 636, 205 S.W. 161. In State ex inf McKittrick v. Southwestern Bell Telephone Company, Banc, 338 Mo. 617, 92 S.W. 2d 612, the Supreme Court of Missouri refused to upset a statute which gave Southwestern Bell the right to place their lines under, along and across public highways and to erect the necessary fixture and poles to sustain the wires. The Court said there was no gratuitous grant since the general public benefited by the extension of phone service. This benefit was in the nature of "consideration" for the legislative authorization. The same theory was used in State ex rel State Highway Commission v. Eakin, Mo. Sup., 357 S.W. 2d 129.

The prohibition of Article III, Section 38(a), was held to not apply to an appropriation for a valid public obligation, State ex rel S. S. Kresge Co. v. Howard 357 Mo. 302, 208 S.W. 2d 247. In State on inf Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 364 Mo. 974, 270 S.W. 2d 44, the Authority had power to acquire property under the power of eminent domain, demolish the structures on it and subsequently sell it to a developer. Under these circumstances, the Court said there was no grant of public money or property to a private person. The whole scheme of redevelopment was held to center on a public purpose.

Based upon the cases cited above, it is our opinion that the Legislature has the power to pay interest on those income tax refund claims that are unpaid because of an insufficient appropriation. If money is immediately appropriated to pay such refunds, these taxpayers will receive their payments about six months later than when they could have reasonably expected to have been paid. The state has had the money for this six month period. Thus, we believe there is sufficient "consideration" for the payment of interest upon its refund.

Article III, Section 40(30)

This provision forbids the General Assembly from passing a special law "where a general law can be applicable, and whether a general law could have been applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." Although the courts are the sole judges of whether a law is general or special, they have established certain standards or tests which they apply to the statutes under review in order to

reach the decision. In Reals v. Courson, 349 Mo. 1193, 164 S.W. 2d 306, 1.c. 307, the Supreme Court established the following test which is often cited by the Court:

"A statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is special \* \* \*. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes."

The classification must not be unreasonable or arbitrary, Davis v. Jasper County, 318 Mo. 248, 300 S.W. 493. "The basis of sound legislative classification is similarity of situation or condition with respect to the feature which renders the law appropriate and applicable." Hull v. Baumann, 345 Mo. 159, 131 S. W. 2d 721, 725.

House Bill No. 159 is the act which attempts to authorize the payment of interest on the unpaid 1963 tax refunds. In passing, it should first of all be pointed out that the title of the act would probably be more accurate if it stated that it was "relating to the payment of interest on income tax refunds". More importantly however, it is the opinion of this office that the act, as presently written, provides for an arbitrary classification of taxpayers who are to receive interest on their 1963 tax refunds and as such is a special law repugnant to the constitutional article cited above. It uses the arbitrary date of August 1, 1964, in designating those who are to receive interest and those who are not; i.e., refunds made prior to this date bear no interest while those after this date will.

If House Bill No. 159 is rewritten so that it designates, as a class, those taxpayers who had a claim for income tax refund arise during the year 1964 and who failed to receive their refund because of an insufficient appropriation by the 72nd General Assembly, then we believe that this classification will be reasonable. Those within the class will be in a "similarity of situation or condition" and will be treated equally. Those excluded from this class cannot claim to come within it because they have, in fact, received their tax refund and have not been deprived of their refunded tax for an unreasonable period of time.

Article III, Section 39 (1), (2), (4), and (5)

These subsections hold that the General Assembly has no power:



"(1) . . . to authorize the giving or lending of the credit of the state . . . to any person . . .

"(2) To pledge the credit of the state for the payment of the liabilities, . . . of any individual . . .

\* \* \* \* \*

"(4) To pay or to authorize the payment of any claim against the state . . . without express authority of law.

"(5) To release or extinguish . . . without consideration, the indebtedness, liability or obligation of any . . . individual due this state . . ."

We have considered this entire section, as well as those cases which have interpreted it, and have concluded that it is not applicable to anything contained herein. The concept of lending or pledging the credit of the state to any person, where relevant to the issues herein, has been sufficiently disposed of in our discussion of Article III, Section 38(a). We do not believe that the issues raised in your opinion request involve the problem of the Legislature authorizing the payment of a claim against the state without express authority of law (House Bill 159 is the authorization) nor the release of an obligation due the state.

#### Article I, Section 13

This section of the Missouri Bill of Rights provides that no retrospective law can be enacted. It is well established in Missouri that this constitutional provision applies to vested rights of individuals and not the state, State ex rel Jones v. Nolte, 350 Mo. 271, 165 S.W. 2d 632. With respect to its school boards, it was held that the state had the right to impair or waive whatever vested rights it may have had. Dye v. School District No. 32 of Pulaski County, 355 Mo. 231, 195 S.W. 2d 874.

In Graham Paper Co. v. Gehner, 332 Mo. 155, 59 S.W. 2d 49, l.c. 51, 52, the Supreme Court of Missouri, En Banc, held:

"The provision of the Constitution inhibiting laws retrospective in their operation is for the protection of the citizen and not the state. The law is stated in 12 C.J. 1087 thus: 'The



state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.' See New Orleans v. Clark, 95 U.S. 644, 24 L. Ed 521. This merely means that such laws are retro-active in their operation, but that the sovereign state may forego or waive its own rights and may be held to have done so by the enactment of the law called in question."

Several statutes are applicable to the issues in this opinion insofar as they exhibit previous legislative recognition for the payment of interest out of public funds. Section 144.685, RSMo. 1959, provides that protested use tax monies if returned to protesting taxpayers should bear interest at the rate of 6 percent per annum on the amount found to be illegally collected. Section 140.530, RSMo. 1959, sets out certain circumstances under which the sale or conveyance of real property for taxes is void. Under these enumerated circumstances, the money paid by the purchaser at such void sale is to be refunded, with interest, out of the county treasury.

In the recent case of I.B.M. v. State Tax Commission, Mo. Sup. 362 S.W. 2d 635, the court held that I.B.M. was entitled to 6 percent interest on their protested money but that the interest was to run only from the date of final judgment.

The court relied specifically upon Section 408.040, RSMo. 1959, which reads as follows:

"Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than six percent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear six percent per annum until satisfaction made as aforesaid."

This section has been held to be applicable to a city, City of Lebanon v. Boggess, K. C. App., 332 S.W. 2d 305; to a housing authority, St. Louis Housing Authority v. Magafas, Mo. Sup., 324 S.W.2d 697,


to the State Highway Commission, State ex rel State Highway Commission v. Green, 305 S.W. 2d 688, and in those cases which involve the revenue laws of the state, State ex rel Pullman v. Consolidated School District No. 50, Stoddard County, 361 Mo. 114, 223 S.W. 2d 702.

CONCLUSION

If House Bill No. 159 is amended so that it creates a classification of taxpayers, who had a claim for income tax refund arise during the calendar year of 1964 but who failed to receive their refund payment because of an insufficient appropriation by the 72nd General Assembly, then we believe such classification is reasonable. We are further of the opinion that there are no constitutional limitations on the Legislature which would prevent it from allowing interest on the payment of these refunds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

February 25, 1965

FILED  
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Honorable Peter H. Rea  
Prosecuting Attorney  
Taney County  
Forsyth, Missouri

Dear Mr. Rea:

This is in response to your request for an opinion of this office dated January 18, 1965. It appears from your letter that a preliminary hearing was held in Taney County in a first degree murder case. The testimony was reduced to writing by the court reporter pursuant to Section 544.370, RSMo 1959, but the witnesses at the hearing did not sign the transcript as is also required by this section.

The defendant was subsequently bound over to the circuit court and a change of venue was obtained to the Circuit Court of Ozark County where the case is now pending. The preliminary hearing transcript has been sent with the other records in the case to the Circuit Court of Ozark County. No objection has ever been made to the failure to comply with Section 544.370.

Your letter requests advice as to the best procedure for you to follow in the event that the defendant should raise the objection that all proceedings in the Magistrate Court of Taney County were invalidated by the failure to obtain the witnesses' signatures to the transcript.

As we advised you in a telephone conversation of January 25, 1965, the failure to comply with Section 544.370 can best be rectified in this case by having the sheriff obtain the original of the preliminary hearing transcript and delivering it to the various witnesses for their signatures. In a subsequent conversation, you advised us that this was being done.

In the event that any objections should be raised at a later date by the defendant regarding this procedure, we suggest

Honorable Peter H. Rea

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you consult State v. Banton, 342 Mo. 45, 111 S.W. 2d 516, which discusses the requirement that homicide case witnesses sign the transcript of their testimony at the preliminary hearing and reviews the prior cases on the subject. In the Banton case, the court held that the failure to comply strictly with the letter of the statute does not invalidate the proceedings so long as the defendant is not prejudiced thereby. The court further stated that mere irregularities in procedure do not affect the court's jurisdiction so long as there is substantial compliance with the statute.

Very truly yours,

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NORMAN H. ANDERSON  
Attorney General

JJM:mje

SCHOOLS: If a district does not maintain any high  
SCHOOL DISTRICTS: school or does not maintain high school  
TUITION: facilities in which all high school students  
of the district can be educated, then as to  
any high school students which cannot be  
educated in the district's high school, the  
district has the duty and authority under Section 161.095, RSMo.  
Cum. Supp. 1963, to pay their tuition to attend a high school  
in the same or an adjoining county.

OPINION NO. 78

April 27, 1965

Honorable C. M. Blackwell  
Prosecuting Attorney  
County of Callaway  
Fulton, Missouri



Dear Mr. Blackwell:

This official opinion is issued in response to your request of January 21, 1965.

We understand the relevant facts to be as follows:

Recently five school districts maintaining elementary schools and one school district, which maintained elementary and a high school, combined into one district by means of reorganization.

We assume that prior to the reorganization all high school pupils residing in the five elementary districts attended high school in some neighboring high school district as required by Section 161.095, RSMo. Cum. Supp. 1963.

Presently, about 110 pupils are attending the one high school, brought into the district by reorganization. About 170 additional high school pupils, residents of the new district, are attending high school in the Fulton school district. Some of these are attending under authority of Sections 162.100 and 162.110, RSMo 1959. Possibly some are attending under authority of Section 161.093, RSMo 1959.

The new reorganized district is in the process of building a new high school sufficient for its needs.

You inquire as to the authority of the new reorganized district to send high school pupils to another district and pay their tuition.

You are apparently aware of the special provisions of Sections 162.100 and 162.110, RSMo 1959 (regarding pupils enrolled in vocational education), and also the provisions of Section

Honorable C. M. Blackwell

161.093, RSMo 1959 (authorizing pupils to be assigned to another more accessible school by the county superintendent). We understand your inquiry to be limited to those high school pupils who do not come within these or other special provisions.

We are of the opinion that every school district has a duty to provide primary and secondary education to all residents of the district between the ages of six and twenty.

Article IX, Section 1 (a), Missouri Constitution 1945, provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law \* \* \*."

Section 163.160, RSMo 1959, provides:

"The board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district. Such gratuitous education, however, shall be provided only out of revenues derived by such school district from sources other than those described in section 3, article IX of the constitution of this state, and only with so much of such revenues as are not required for the establishing and maintaining of free public schools in such school districts for the gratuitous instruction of persons between the ages of six and twenty years, provided, that nothing in this section shall be construed as affecting the basis of apportionment of the public school fund of this state as now fixed by law."

In Linn Consolidated School District v. Pointer's Creek School District, Mo., 203 S.W.2d 721, what are now Section 165.013, RSMo 1959, and Section 161.095, RSMo, Cum. Supp. 1963, were before the court. The court held (l.c. 724): "Both statutes are mandatory to the extent that the district can comply by levying the rate of taxes permitted by the constitution."



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Section 165.013 mentioned supra, required every district to provide for eight months school each year subject to forfeiture of its organization. (After July 1, 1965, a nine-month term will be required. See: Section 162.081, RSMo. Cum. Supp. 1963 Appendix.)

Section 161.050 mentioned supra, provides in part:

"1. The board of directors of each school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each pupil resident therein who has completed the work of the highest grade offered in the schools of the district and who attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered." (Emphasis added.)

Section 160.051, RSMo. Cum. Supp. 1963 Appendix (effective July 1, 1965) provides in part:

"A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of six and twenty years. . . ."

From the above, we are of the opinion that every school district has the duty to provide elementary and high school education at public expense to residents between the ages of six and twenty.

Obviously if the districts have the duty to provide high school education at public expense, they also have the authority to expend funds to perform that duty.

Not every school district of this state performs its duty of providing high school education by maintaining its own building and staff. But, by the provisions of Section 161.095, if a district does not maintain its own high school, it must perform its duty by paying the tuition of its resident high school pupils and have them attend some neighboring high school.

Section 161.095 qualifies the duty of a school district to pay the tuition of its high school pupils attending another district by the phrase, "[if the district] does not maintain an approved high school offering work through the twelfth grade."

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Therefore, if high school facilities are available in a pupil's home district, the district does not have the duty or authority to pay the pupil's tuition at a high school outside the district (except the special situations noted earlier). This office has previously ruled a school district cannot pay the tuition of a pupil who voluntarily attends another district (Opinion 74, Reynolds, 1/17/48, copy enclosed).

We note that if Section 161.095 is considered alone and if the qualifying phrase is read literally, then a district which maintained an approved high school, even though wholly inadequate to contain the high school pupils of the district, would not have the duty to pay the tuition of pupils attending high school outside their home district.

For example, if the district had 1,000 high school pupils but only facilities for a maximum of 100 pupils, 900 pupils would have to look elsewhere for schooling. Such a circumstance would rarely exist, but might arise from a fortuitous event as fire or natural disaster or from a sudden influx of population. The 900 pupils, hypothesized above, are compelled by law to attend school. Section 164.010. If they attend a school other than in their home district, that district may charge them tuition (Section 163.010), and may refuse admission if the tuition is not paid (Opinion 95, Wessel, 1/31/51, copy enclosed).

Thus, if Section 161.095 is read literally, the district of residence could avoid its duty to provide gratuitous education to its residents by transferring the expense to the pupil or parents. Such a construction would be contrary to the school laws noted supra.

"It is a cardinal rule, universally accepted, that in the exposition of a statute, the intention of the lawmaker will prevail over the literal sense of the terms; its reason and intention will prevail over the strict letter." State v. Schwartzmann Service, Mo.App., 40 S.W.2d 479, 480."

"We may not capriciously ignore the plain language of the statute but in determining what the language really means we may consider the entire purpose and policy of the statute and 'the language in the totality of the enactment' and construe it in the light of 'what is below the surface of the words and yet fairly a part of them'." State v. Proctor, Mo., 361 S.W.2d 802, 805.

Honorable C. M. Blackwell

The qualification, "does not maintain an approved high school" must be read in context with the school laws of this State.

We are of the opinion that the qualification must be read in relation to the district's obligation to the resident high school pupils. For example: as to the hypothetical 900 pupils, the district does not maintain an approved high school and therefore would have the duty to provide for the education elsewhere.

We note that a district which does not own sufficient buildings may rent or lease space for school purposes. Section 166.010. We are informed that some school districts are renting other buildings in their communities in order to accommodate their pupils. Also, under Section 161.095, a school district may maintain only the lower high school grades and pay the tuition of pupils above those grades who attend high school outside the district.

Caveat: This opinion should not be construed as authorizing school districts to pay the tuition of high school students attending a high school outside the district merely because of crowded classrooms or variations in curriculum, etc.

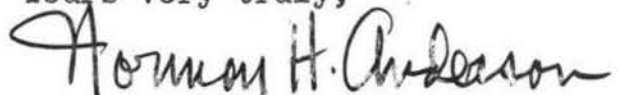
As to the authority of the North Callaway R-1 District to pay tuition of its high school pupils attending the Fulton District, we could not express any particular opinion without knowledge of all the facts and circumstances, i.e., the number of pupils now attending under Sections 162.100 or 161.093, the capacity of the R-1 schools, etc. Furthermore, such a factual judgment, within the legal rules we have set out above, should in the first instance be made by the R-1 school board. If they abuse their discretion, they are of course subject to legal restraints.

#### CONCLUSION

Therefore, it is the opinion of this office that each school district has the duty to provide at public expense elementary and high school education to residents of the district between the ages of six and twenty. If a district does not maintain any high school or does not maintain high school facilities in which all high school students of the district can be educated, then as to any high school students which cannot be educated in the district's high school, the district has the duty and authority under Section 161.095, RSMo. Cum. Supp. 1963, to pay their tuition to attend a high school in the same or an adjoining county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,



NORMAN H. ANDERSON  
Attorney General

Enc.(2)

July 22, 1965



Honorable James L. Paul  
Prosecuting Attorney of McDonald County  
Pineville, Missouri 64856

Dear Mr. Paul:

This is in answer to your request for an opinion of this office which asks:

"Are school teachers, employed within the Reorganized School District in the state of Missouri but living in Arkansas or Oklahoma and commuting back and forth, and being paid from the school district funds of the district in which they are teaching, required to purchase motor vehicle license for the cars used in the commuting?"

Subsection 1 of Section 301.271, RSMo concerns reciprocity in registration with other states. This section reads as follows:

"1. Unless otherwise provided by duly executed agreements entered into pursuant to Sections 301.271 to 301.279, a nonresident owner, owning any motor vehicle which has been duly registered for the current year in the state, District of Columbia, territory or possession of the United States, foreign country or other place of which the owner is a resident, and which at all times when operated in this state has displayed upon it the number plate issued for the vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any such registration fee to this state; but the provisions of this subsection shall be operative to allow such owner to operate or permit the operation of such vehicle owned by a nonresident of this state only to the extent



Honorable James L. Paul

that under the laws of the state, District of Columbia, territory or possession of the United States, foreign country or other place of residence of the nonresident owner, substantially equivalent exemptions are granted to resident of Missouri for the operation of vehicles duly registered in Missouri."

We are informed by the State Highway Reciprocity Commission that there is no agreement between Missouri and Arkansas nor between Missouri and Oklahoma which covers passenger automobiles in this situation.

Under the provisions of Section 301.271, RSMo., Missouri grants reciprocity to those persons living in Arkansas and Oklahoma, who commute to work in Missouri to the extent that such states permit Missouri residents who commute to work in such states to operate their passenger motor vehicles in such states without registering such motor vehicles or paying registration fees on such vehicles to such states.

Section 75-238, Arkansas Statutes Annotated provides as follows:

"Any motor vehicle or motorcycle belonging to any person who is a non-resident of this State and who has registered such motor vehicle or motorcycle in and has complied with all the laws of the state, territory, Federal District of the United States or any Province of the Dominion of Canada in which he resided with respect to the registration of motor vehicles and the display of registration numbers and who shall conspicuously display such registration number as required thereby, may be operated in this State as follows, to-wit:

\* \* \* \* \*

"Third, a privately owned and duly registered motor vehicle not operated for hire but for the purpose of going to and from his place of regular employment, and the making of trips for the purchasing of goods, wares and merchandise; providing said owner lives outside this state:

Honorable James L. Paul

Section 75-239, Arkansas Statutes Annotated provides as follows:

"The provisions of this law [§§ 75-238, 75-239] shall be operative as to a vehicle owned by non-resident of this state only to the extent that under the laws of the state, territory, Federal District of the United States or any Province of the Dominion of Canada, or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this State."

In a letter to this office, dated June 18, 1965, Mr. W. H. L. Woodyard, Director of the Motor Vehicle Division of the Department of Revenue, of Arkansas, wrote as follows:

"It has always been the policy of this department to permit residents of another State to go back and forth to their place of employment in this State without being required to purchase Arkansas license."

Since Missouri residents commuting to work in Arkansas are not required to register their passenger motor vehicles or pay registration fees to such state under the provisions of Section 75.238, Arkansas Statutes, Annotated and under the ruling of the Motor Vehicle Division of the Arkansas Department of Revenue, Arkansas residents whose passenger motor vehicles have been properly registered for the current year in such state and who commute to work in Missouri are not required to register such vehicles or pay a registration fee to this State.

Section 22.12, Title 47, Oklahoma Statutes Annotated provides in part as follows:

"Any automobile, motorcycle or house trailer within this State, owned or possessed by a visiting non-resident and which is properly registered in its native State for the current year shall be registered with a duly authorized Motor License Agent of the Commission without fee, if such application is made within fifteen (15) days after date of entry into this State, and such registration and license shall terminate upon the expiration of sixty (60) days from the date of



Honorable James L. Paul

entry into the State. If such vehicle enters the State thereafter during the calendar year, or remains here for any period in excess of sixty (60) days, it is deemed to be subject to tax in this State and shall be forthwith reregistered upon the same terms and conditions that resident owners are required to register such vehicles in this State and shall be subject to a penalty of ten cents (\$.10) per day from such date to the date of registration, such penalty to continue to accrue for a period of thirty (30) days upon failure to register, after which time, it shall be equal to the license fee due, and any such vehicle may be seized and held at any time for any such delinquency and sold for non-payment of the license fees in the same manner that domestic vehicles may be seized and sold."

Such Section appears to require registration of passenger motor vehicles of non-residents of Oklahoma, if the vehicle is in the State of Oklahoma for a period in excess of sixty days. However, such statute is interpreted by the public officials of Oklahoma as exempting from registration passenger motor vehicles of non-residents which vehicles are properly licensed in the state in which the operator is a resident, when the operator commutes to work in Oklahoma, daily.

In a letter to this office dated April 25, 1965, Mr. Joseph C. Muskrat, an Assistant Attorney General of Oklahoma, wrote as follows:

"It has been the practice of the Oklahoma Tax Commission to require the licensing of the commuter's vehicle unless the commuting is done on a daily basis. Therefore, if the commuter were home only on weekends, his automobile would be required to be registered in Oklahoma."

In a letter to this office dated June 8, 1965, Mr. F. D. Murphy, Director of the Motor Vehicles Division of the Oklahoma Tax Commission wrote as follows:

Honorable James L. Paul

"Section 22.12, Title 47, O. S. 1961 provides in part, 'Any automobile within this state owned or possessed by a visiting non-resident which is properly registered in its native state for the current year shall be registered with a duly authorized Motor License Agent of the Commission without fee if such application is made within 15 days after the date of entry into this state, and such license shall terminate upon the expiration of 60 days from the date of entry into this state. If such vehicle enters the state thereafter during the calendar year or remains here for any period in excess of 60 days, it is deemed to be subject to tax in this state and shall be forthwith reregistered upon the same terms and conditions that resident owners are required to register such vehicle in this state.'

"The above provision is the only provision in the Oklahoma Motor Vehicle Law dealing with non-resident owned automobiles being operated in Oklahoma and refers to visiting non-residents rather than persons who accept employment in Oklahoma.

"Ordinarily we require all persons who are gainfully employed in Oklahoma to register any automobile owned or possessed and being operated upon the highways of this state. However, for a number of years it has been the practice of most states to not require the registration of a vehicle in the state where a person is working provided he is commuting daily from the state in which he lives, and provided further his vehicle is properly registered in the state where he is a legal resident. This practice is generally followed in the mining area in the northeastern corner of Oklahoma where residents of Kansas and Missouri are working in the mines but return to their homes each night."

It is, therefore, our view that Arkansas residents whose passenger motor vehicles are properly registered in such state and who commute to work in Missouri are not required to register such vehicles in this State.

Honorable James L. Paul

It is further our view that residents of Oklahoma whose passenger motor vehicles are properly registered in such state and who commute to work in Missouri are not required to register such vehicles in this state, only if such persons commute to work in this State from Oklahoma daily.

Respectfully submitted,

NORMAN H. ANDERSON  
Attorney General

NHA:fms

INSURANCE: Acceptance of regular life insurance law by Mid America Insurance Company, a stipulated premium plan company.

Opinion No. 81

January 25, 1965



Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

Receipt is acknowledged of your letter of January 25, 1965, in which you requested an opinion from this office, pursuant to Section 377.450, RSMo 1959, as to whether documents submitted by Mid-America Insurance Company are in proper legal form for the acceptance of the provisions of Sections 376.010 to 376.670, RSMo 1959, by a life insurance company doing business under the stipulated premium plan pursuant to Sections 377.200 to 377.460, RSMo 1959. These documents consist of the Certificate of Amendment, Minutes of Special Meeting of Board of Directors, Waiver of Notice of Special Meeting of Board of Directors, Minutes of Special Meeting of Stockholders, Notices of Special Meeting of Stockholders, Proof of Publication of Notice of Special Meeting of Stockholders, Minutes of Second Special Meeting of Board of Directors, Waiver of Notice of Second Special Meeting of Board of Directors, and Amended Articles of Agreement.

Pursuant to Section 377.450, we have examined the documents enumerated above. Upon such examination it is the opinion of this office that the aforesaid documents conform to the provisions of Sections 376.010 to 376.670, RSMo 1959, and the legal form thereof is approved.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

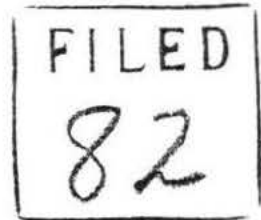
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NORMAN H. ANDERSON  
Attorney General

PHYSICIANS: Physicians who accept professional staff appointments  
HOSPITALS: in Missouri hospitals and regularly practice medicine  
and surgery in those hospitals are maintaining an  
"appointed place to meet patients or receive calls  
within the limits of this state." Such physicians  
are required to have a Missouri license.

Opinion No. 82

March 1, 1965



Dr. H. M. Hardwicke, M.D.  
Acting Director  
Division of Health  
Jefferson City, Missouri

Dear Dr. Hardwicke:

Your request for an official opinion dated January 21, 1965,  
reads as follows:

"When physicians who are not licensed in  
Missouri are given professional staff appointments in Missouri hospitals and regularly  
practice medicine and surgery in these  
hospitals, does this constitute 'an appointed  
place to meet patients or receive calls  
within the limits of this state,' and is a  
license to practice medicine and surgery in  
Missouri required under these circumstances?"

We believe that Sections 334.010, 334.150, RSMo 1959, are applicable to the question which you have submitted. They read as follows:

"334.010. . . It shall be unlawful for any  
person not now a registered physician within  
the meaning of the law to practice medicine  
or surgery in any of its departments, or to  
profess to cure and attempt to treat the sick  
and others afflicted with bodily or mental  
infirmities, or engage in the practice of mid-  
wifery in this state, except as herein provided.

"334.150. . . It is not intended by sections  
334.010 and 334.140 to prohibit isolated or  
occasional gratuitous service to and treatment  
of the afflicted, and sections 334.010 to 334.140  
shall not apply to physicians and surgeons com-  
missioned as officers of the Armed Forces of the



Dr. H. M. Hardwicke, M.D.

United States or of the Public Health Services of the United States while in the performance of their official duties, nor to any licensed practitioner of medicine and surgery in a border state attending the sick in this state, if he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state, and if he complies with the statutes of Missouri and the rules and regulations of the department of public health and welfare relating to the reports of births, deaths and contagious diseases; and sections 334.010 to 334.140 shall not apply to Christian Science practitioners who endeavor to cure or prevent disease or suffering exclusively by spiritual means or prayer, so long as quarantine regulations relating to contagious diseases are not infringed upon; but no provision of this section shall be construed or held in any way to interfere with the enforcement of the rules and regulations adopted and approved by the division of health of the state department of public health and welfare or any municipality under the laws of this state for the control of communicable or contagious diseases. [Emphasis supplied]

As related to the facts submitted in your inquiry these sections prohibit the practice of medicine in Missouri by unregistered physicians except that a border state physician may do so, "provided he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state." We note that the statute uses the two terms "office or appointed place" in the disjunctive sense. We believe that both of these terms must be construed as serving some effective purpose under the general principle that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. (See Sec. 4705, Sutherland Statutory Construction, by Horack.)

If we hold that the term "appointed place to meet patients" must be given full effect and is not mere surplusage, then we are confronted with the question of whether the routine practice of medicine and surgery in a hospital by a staff member constitutes practice at an "appointed place." The appellate courts of at least one state have construed the term "appointed" and have held that it is the equivalent of the term "designated." (See Santa Barbara County vs. Janssens, 169 P. 1025, 1027; 177 Cal. 114.) We believe that the legislature in using the term "appointed place" had in mind this accepted meaning of the term and that it intended to require a license if the physician



Dr. H. M. Hardwicke, M.D.

utilized the hospital as a designated or arranged place for meeting patients.

We believe that the above conclusions are strengthened and supported by the fact that the State Division of Health has apparently given precisely this interpretation to this passage for a considerable period of time. We note that Section IV, Regulation No. 1, of the Missouri Hospital Regulations was promulgated and filed in February of 1960, and has remained in force since that time. It provides as follows:

"REGULATION NUMBER 1, PHYSICIANS AND DENTISTS

"The governing body shall state in its bylaws that every physician and/or dentist requesting permission to practice in a hospital shall submit an application for staff membership in writing to the governing body of the hospital upon forms approved by the governing body. Each physician so applying shall specifically state in his application: his training and qualifications; his acceptance of the governing body as the supreme legal authority in the hospital; his willingness to abide by the bylaws of the staff in all respects; and his determination to practice his profession in a manner which is legal, moral and ethical. The professional staff of the hospital shall be an organized group who shall initiate, and with the approval of the governing body of the hospital, adopt bylaws, rules, regulations and policies governing their professional activities in the hospital. General practitioners shall be permitted to practice in the hospital in accordance with their competence as recommended by the professional staff and authorized by the governing body.

"Code: Satisfactory Compliance - This item shall be deemed to have been satisfied if:

"1. Each member of the staff is a physician and/or dentist who is a graduate of an approved school of medicine, osteopathy or dentistry legally licensed to practice medicine, osteopathy or dentistry in the State of Missouri, and who is competent in his respective field and is a worthy character and is schooled in matters of professional ethics. Each member is reappointed annually to the staff at the discretion of the governing body. [Emphasis supplied]

Dr. H. M. Hardwicke, M.D.

We have not located any Missouri case specifically interpreting Section 334.150. However, we believe that State v. Davis, 92 SW 484, 194 Mo. 485, is quite consistent with the principles enunciated herein, both from the standpoint of interpreting the Missouri Medical Practice Act (Chapter 334) and from the standpoint of indicating the public policy involved. In that case the Court (under a previous statute not using the term "appointed place") held that where the defendant physician (registered in Illinois, but not registered in Missouri), regularly and routinely came to a room at a hotel in Missouri and there held himself out as a physician, diagnosed the ailment of a patient and sent medicine to the patient from Illinois, and charged the patient for same, was guilty of violating the practice act.

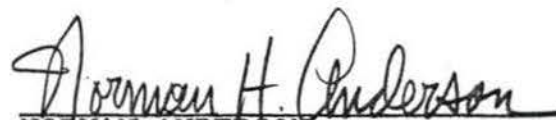
We are enclosing a copy of two previous opinions of this office relative to the practice of medicine, which we believe may be of interest to you. One of these opinions was issued to Dr. E.T. McGaugh on September 4, 1934, and the other opinion was issued to Mr. John A. Hailey on March 29, 1955. The first named opinion discusses the legal remedies available where individuals engage in the practice of medicine without a license and the second opinion holds that unlicensed physicians may not engage in the practice of medicine regardless of the nature of the employer or the character of the supervision.

#### CONCLUSION

Therefore, it is the opinion of this office that physicians who accept professional staff appointments in Missouri hospitals and regularly practice medicine and surgery in those hospitals are maintaining an "appointed place to meet patients or receive calls within the limits of this state". Such physicians are required to have a Missouri license.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch

Yours very truly,

  
NORMAN ANDERSON  
Attorney General

Enclosures (2)



COUNTY RECORDER OF DEEDS: When an otherwise properly recordable instrument is presented and there are maps, plats, surveys, or other documents attached it is the duty of the recorder to record the instrument regardless of whether the maps, plats, surveys, or other documents are affixed with the seal and signature of a land surveyor.

SURVEYORS:

OPINION NO. 83

June 8, 1965

Honorable Earl R. Blackwell  
State Senator, 22nd District  
Hillsboro, Missouri



Dear Senator Balckwell:

We have your request for an opinion of this office on the question of whether a map, plat, survey, or other document that is attached to another properly recordable instrument must bear the personal seal and signature of a land surveyor as required by Section 344.120, RSMo 1959.

Section 344.120 reads as follows:

"It shall be unlawful for the recorder of deeds of any county, or the clerk of any city or town, or the clerk or other proper officer of any school, road, drainage, or levee district, or other civil subdivision of this state, to file or record any map, plat, survey or other document prepared by any land surveyor, which does not have impressed thereon, and affixed thereto, the personal seal and signature of the registered land surveyor by whom, or under whose authority and direction, the map, plat, survey, or other document was prepared."

This section is a part of Chapter 344, Land Surveyors, which regulates land surveying for compensation by establishing qualifications and registration for land surveyors. Section 344.110, RSMo 1959, in requiring a seal, says:

"Every registered land surveyor shall procure a personal seal, in form approved by the professional engineering division of the board, and shall affix the seal, and his signature

upon all maps, plats, surveys, or other documents, before the delivery thereof to any client, or before offering to file or record any such map, plat, survey, or other document, in the office of the recorder of deeds of any county, or in the office of the city clerk of any city or town, or with the clerk or other proper officer of any school, road, drainage, or levee district, or other civil subdivision of this state."

Section 344.120, then, helps to regulate land surveying by the method of not allowing documents prepared by land surveyors to be recorded without a seal and signature, and Section 344.130, RSMo 1959, makes it a misdemeanor for anyone who violates the provisions of Chapter 344. However, Section 344.120 does not intend to make the recorder the chief enforcer of Chapter 344. Nor does Chapter 344 purport to be a recording act so that a map, plat, etc., is valid only with a seal and signature. This is borne out by the enclosed copy of an Attorney General's opinion to the Honorable J. A. Appelquist, dated June 23, 1959, where this office said that the recorder could not refuse to accept a plat on the sole ground it does not have a seal and signature of a registered surveyor.

But Section 344.120 does not itself distinguish between a map, plat, etc., filed on its own accord and one filed as part of a properly recordable instrument.

Chapter 59 is the recording law of Missouri for all instruments concerning land. Section 59.330, RSMo Cum. Supp. 1963, reads as follows:

"It shall be the duty of recorders to record:  
(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; . . ."

And, Section 59.400, RSMo 1959, reads as follows:

"The recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, with the

plats, surveys, schedules and other papers therein referred to, and thereto annexed, in the order of time when the same shall have been delivered for record, by writing them word for word, in a fair hand, noting, at the foot of such record, all interlineations and erasures and words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year, when the instrument so recorded was delivered to him or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered."

Section 59.660, RSMo 1959, makes it a misdemeanor for the recorder to willfully neglect his duties under this chapter and Section 59.650, RSMo 1959, provides for double damages for losses due to the recorder's neglect of his duty to record.

This recording act helps to facilitate Chapter 442, Titles and Conveyances of Real Estate, so that subsequent purchasers and encumbrances can safely determine title to land. Section 442.020, RSMo 1959, provides:

"Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

Section 442.240, RSMo 1959, provides that notice is imparted from the recording of such a deed and Section 442.380, RSMo 1959, directs that such instruments shall be recorded.

Thus under Chapters 59 and 442 it is the duty of the recorder to record a properly recordable deed when presented, and there is no requirement for a seal and signature of a surveyor to be on a map, plat, etc., attached to a deed in order to make the deed recordable. In fact, Section 59.400 says that a proper deed shall be recorded without delay "with the plats, surveys, schedules and other papers therein referred to, and thereto annexed."

If Section 344.120 were read to include all maps, plats, etc., attached to an otherwise properly recordable deed then a conflict could arise in that the recorder would commit a misdemeanor for recording such instrument without a seal and signature on the maps, plats, etc., and yet if he should fail in his duty to record promptly he will also commit a misdemeanor, and face possible liability for double damages.

It is the opinion of this office that when Section 344.120 says that it is unlawful for the recorder ". . . to file or record any map, plat, survey or other document . . ." this means those documents which are filed or recorded in their own right and not as part of an otherwise recordable deed which affects title. Support for this distinction is offered by Section 344.110 which requires a seal or signature on all maps, plats, etc., "before the delivery thereof to any client, or before offering to file or record." Surely the client has no duty to enforce Chapter 344, and when that client presents the map, plat, etc., as part of a deed affecting title the recorder's first duty is to record that deed, with attachments, immediately on presentation.

#### CONCLUSION

It is the opinion of this office that when an otherwise properly recordable instrument is presented and there are maps, plats, surveys, or other documents attached it is the duty of the recorder to record the instrument regardless of whether the maps, plats, surveys, or other documents are affixed with the seal and signature of a land surveyor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,

*Norman H. Anderson*  
NORMAN H. ANDERSON  
Attorney General



BOND ISSUES:  
PARK BOARD:  
STATE TREASURER:  
INTEREST:

Interest earned from deposit or investment of sinking funds established in connection with the State Park Revenue Bonds should be credited to said sinking funds and not to General Revenue.

OPINION NO. 84

May 24, 1965



Mr. Lee C. Fine  
Director of Parks  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Fine:

This is in response to your opinion request which reads as follows:

"I would like your opinion on the following: Sections 253.210 and 253.230 RSMo Cum. Supp. 1963 authorize the State Park Board to issue revenue bonds for the construction of certain projects in state parks. Bonds have been issued for several of these projects. The bond agreements require that we maintain reserve and depreciation funds. Can you please advise me whether the interest earned on these funds must be deposited to general revenue or whether they may be made a part of the reserve or depreciation funds?"

We have examined the resolution of the State Park Board authorizing the issuance of the revenue bonds in question. The resolution provides for the creation of several funds, including a "Bond Reserve Account" and a "Depreciation Account."

Section 14 of the resolution provides that:

"Moneys held in the 'Bond Reserve Account' and in the 'Depreciation Account' shall be invested by the State Treasurer in bonds or other direct obligations of the United States Government becoming due within 10 years from date of purchase. All interest on any investments held in any fund or account shall accrue to and become a part of such fund or account."

The resolution of the Park Board constitutes an agreement between the Board and the purchasers of the bonds by which the Board promises to perform certain acts in return for the purchase of the bonds. It can be seen that as a part of this agreement, the Board has covenanted that all interest earned on idle funds held pursuant to the resolution will be made a part of such funds.

This is in keeping with the general principle of law as stated by the Texas Court of Civil Appeals in *Lawson v. Baker*, 220 S.W. 260, 272, that:

"Interest, according to all the authorities, is an accretion to the principal fund earning it, and, unless lawfully separated therefrom, becomes a part thereof."

See also *Pomona School District v. Payne* (California District Court of Appeals), 50 P. 2d 822, 825.

With regard to funds held by the state, the same principle is set out in 81 C.J.S., States, § 155 (a), page 1192:

"Interest earned by a deposit of special funds is an increment accruing thereto, and not to the general funds of the state."

From the foregoing, it is clear that the general rule is that interest earned on the deposit or investment of what are generally termed "sinking funds" held in connection with a bond issue should be credited to the sinking funds and not to the State General Revenue Account.

The question remains whether this general rule is modified in Missouri by the operation of Section 30.240, RSMo 1959, which provides that all yield, interest, etc., derived from the deposit or investment of "state moneys" shall be credited by the State Treasurer to the General Revenue Account.

In the case of *Petition of the Board of Public Buildings*, Mo., 363 S.W. 2d 598, the Supreme Court dealt with revenue bonds of the State Board of Public Buildings issued for the purpose of constructing a state office building in Kansas City. The court held that revenues accruing as rentals paid by the various state agencies occupying the office building were a separate trust fund to be held and used solely for the purpose of repaying the bond holders and were, therefore, not "state moneys" except as contrasted with "private funds" and that it was proper to place such funds in the custody of the State Treasurer as custodian but such moneys were not a part of the state treasury funds.

In the present case, the Park Board resolution authorizing the bond issue provides that revenues earned by the project are to be used to establish a "Bond Reserve Account" and a "Depreciation Account" as well as to make principal and interest payments. The resolution provides that not less than \$1,800.00 per month shall be paid into the Bond Reserve Account until said account shall aggregate \$42,000.00, and that this sum shall be held in trust to prevent any default on principal and interest payments. Similarly, an aggregate sum of \$12,000.00 is to be paid into the Depreciation Account for the purpose of maintaining the project in order to keep it in efficient and successful operation.

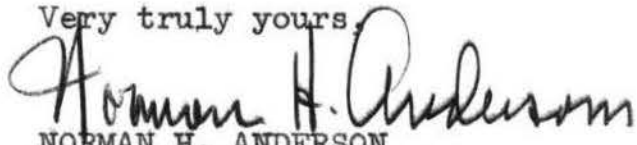
Since this money represents earnings of the project, it does not constitute "state money" under the decision of the Supreme Court in the Public Buildings case. Therefore, the provisions of Section 30.240 do not apply and the yield earned on the deposit or investment of funds in the Bond Reserve Account and the Depreciation Account should be credited to said accounts and not to General Revenue.

#### CONCLUSION

It is, therefore, our opinion that all interest earned through the deposit or investment of money in special funds established in connection with the issuance of State Park Revenue Bonds should be credited to such special funds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James J. Murphy.

Very truly yours,

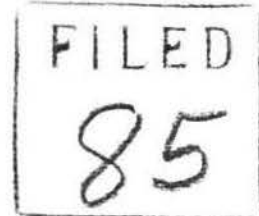
  
NORMAN H. ANDERSON  
Attorney General

BONDS:  
SURETY BONDS:  
COUNTY COURT:  
OFFICERS:  
COUNTY SURVEYORS:

A County Court is authorized in its discretion to pay the bond premium for the Official Bond of the County Surveyor.

OPINION NO. 85

March 2, 1965



Honorable George B. Scott, Jr.  
Prosecuting Attorney, Butler County  
Butler County Courthouse  
Poplar Bluff, Missouri 63901

Dear Mr. Scott:

You have requested an opinion of this office as to the responsibility of a county court to pay for the public bond of the County Surveyor under the provisions of Section 107.070 RSMo. 1959. The enclosed opinion of this office to E. W. Bennett, dated January 6, 1944, bears on your inquiry. It holds that under Section 3238, RSMo. 1939, now Section 107.070, RSMo. 1959, a county court may pay the premium on a surety company bond of officers who are required by law to enter into an official bond, where such bond protects the county. The question then becomes, does a county surveyor's bond protect the county?

Section 60.030 RSMo. 1959, states:

"Oath - bond - receipt of records.  
Every county surveyor shall, within sixty days after receiving his commission, and before entering upon the duties of his office, take the oath prescribed by the constitution, and enter into bond to the state of Missouri, in a sum not less than one thousand nor more than five thousand dollars, to be determined by the county court, conditioned that he will faithfully perform all the duties of the office of county surveyor, and that at the expiration of his term of office he, or in case of his death, his executors or administrators, will

immediately deliver to the recorder of deeds of the county all the records, books and papers appertaining to his office; and it is hereby made the duty of the clerk of the county court to deliver to the recorder of deeds of their respective counties all the books, plats and copies of surveys of any county surveyor, or which may be on file in their respective offices, and take the recorder's receipt for the same."

The statute provides that the surveyor's bond shall be conditioned that at the expiration of his term or in case of his death there will be delivered to the Recorder of Deeds all the records, books, and papers appertaining to the surveyor's office. Section 60.340 RSMo. 1959, provides that the surveyor is to keep correct records of all surveys made by him in a book to be procured at county expense, which book is the property of the county.


Since the bond provides for the turning over of such books and papers to the County Recorder and since such books and papers are the property of the county, it results that the bond is given, in part at least, for the protection of the county.

#### CONCLUSION

It is the opinion of this department that a County Court is authorized, in its discretion, to pay the bond premium for the official bond of the County Surveyor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure

CITIES OF THE THIRD CLASS:  
CITIES, TOWNS, AND VILLAGES:  
ANNEXATIONS:  
ELECTIONS:  
CANDIDATES:  
COUNCILMEN:  
RESIDENTS:

Previous residence in the territory annexed to the City of Macon is equivalent to residence in the City of Macon for the purpose of computing the period of residence required by Section 77.060, RSMo 1959, relating to candidates for councilman.

February 19, 1965

OPINION NO. 89

Honorable James N. Foley  
Assistant Prosecuting Attorney  
Macon County  
Macon, Missouri



Dear Mr. Foley:

This opinion is being rendered pursuant to your letter of January 15, 1965, in which you ask the following question:

"Does a person meet the residency requirements of Section 77.060, R.S.Mo. 1959, if he has lived in the same house for the last 30 years, but up until November 3, 1964, that house was not within the limits of the City of Macon, however, on that date that house, along with other territory, was annexed by the City of Macon?"

The question this opinion deals with is whether previous residence in the territory annexed to the City of Macon is equivalent to residence in the new territory for the purpose of computing the period of residence required by Section 77.060, RSMo 1959.

Section 77.060, relates to the qualifications of councilmen in cities of the third class and provides as follows:

"No person shall be councilman unless he is at least twenty-one years of age prior to taking office, a citizen of the United States, and an inhabitant of the city for one year next preceding his election, and a resident of the ward from which he is elected six months next preceding his election. Whenever there is a tie in the election of a councilman, the matter shall be determined by the council."



The similar principle of law was involved in the case of Gibson v. Wood, 105 Ky. 740, 49 SW 768, 43 LRA 699, cited in 37 Am. Jur. 860, Municipal Corporations, Section 230. While the defendant in such case had resided in his present home more than the three year statutory period before his election, the territory upon which his residence was located had been a part of the City of Louisville for about two months at the time of his election to city office.

In ruling that the defendant had met the residency requirements of the Kentucky statute, the Court stated at page 770:

"In the case at bar the defendant, Wood, has done no act by which he should lose any of his political rights, either as a resident of the town of Enterprise or as a resident of the city of Louisville. The city of Louisville has seen fit to incorporate the town of Enterprise, and make it a part of the city of Louisville. In my opinion, when the city of Louisville annexed the town of Enterprise, it adopted the conditions then existing in the town of Enterprise, as to residence and citizenship, as a part of the city government, and former citizens of the town of Enterprise, who thus became citizens of the city of Louisville, were entitled to all their rights, as former citizens of Enterprise, in determining their eligibility to office in the city of Louisville. When the defendant and his territory became parts of the city of Louisville, they are entitled to all the benefits that belong to all the other property and citizens of the city of Louisville. To hold otherwise would be to bring persons into the city of Louisville, and to burden them with city taxation and all the burdens of our city government, without granting them all the privileges which it had granted to its other residents. It would put the burdens on all residents alike, but would give different rights to different classes of citizens, by distinguishing the old resident from the annexed resident. It follows that the defendant was eligible to the office to which he was elected. . ."

This case was later cited with approval by the Court of Appeals of Kentucky in Meffert v. Brown, 116 SW 779.

Honorable James N. Foley

This principle is enunciated in 62 CJS 919, Municipal Corporations, Section 749c which states:

"Residence in an annexed territory for the statutory period immediately preceding annexation is equivalent to residence in the new territory . . ."

For other authorities so holding, see: 37 Am. Jur. 860, Municipal Corporations, Section 230; Municipal Corporations, 3 McQuillin 274, Section 12.59 (3rd Edition Revised); Charles S. Rhyne, Municipal Law, 125 Section 8-4.

#### CONCLUSION

It is therefore the opinion of this office that previous residence in the territory annexed to the City of Macon is equivalent to residence in Macon for the purpose of computing the period of residence required by Section 77.060, RSMo 1959, setting out the residential qualifications of councilmen in third class cities. Therefore, a person residing for thirty years in the same house which was not part of the City of Macon until annexed on November 3, 1964, meets the requirements of Section 77.060, RSMo 1959 and such person may file for the Macon City Council on February 21, 1965, and run in the primary election on March 9, 1965.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

March 29, 1965



Mr. Leon F. Burton  
Secretary-Treasurer  
State Board of Barber Examiners  
131 Capitol Building  
Jefferson City, Missouri

Dear Mr. Burton:

This letter is in answer to your request for an opinion of this office on the question which you have stated as follows:

"Under Section 328.127 it states 'Any graduate of a barber school or college who fails to register as an apprentice within three years after certification or who fails to complete the required eighteen months apprenticeship during the three year period of registration, may be registered as an apprentice in good standing by showing to the satisfaction of the Board:'

"As an example, would an apprentice in two years from graduation have three years longer to serve the eighteen months apprenticeship or is he required to serve the eighteen months in the three year period from the date of graduation of school. In either case, does the apprentice also have to pass the examination in said period, or just complete the required eighteen months apprenticeship."

Section 328.080 RSMo 1959, provides for the issuance by the Board of Barber Examiners to a graduate of a barber school of a certificate of registration entitling him to practice barbering in this state. This section requires, among other things, that the applicant be a registered apprentice in good standing at the time of application.

Section 328.127 RSMo 1959, provides that a graduate of a barber school who fails to register as an apprentice within three years after certification, or who fails to complete the eighteen months of apprenticeship during the three-year period of registration, must satisfy certain enumerated further requirements in order to be registered as an apprentice in good standing.

Under Section 328.123 RSMo 1959, a barber school graduate, after he has been certified to the Board of Barber Examiners as having completed a course of study in a barber school pursuant to Section 328.120 RSMo 1959, is allowed three years within which to register as an apprentice. After he has registered as an apprentice, the graduate is allowed another three years within which to complete the eighteen months apprenticeship required for certification by the board.

Therefore, in the example given in your inquiry, an apprentice who registers as an apprentice two years after graduation has three more years within which to serve the eighteen months of apprenticeship under Section 328.123 supra, and is not required to serve the eighteen months in the three-year period after the date of graduation from the school.

Further, an apprentice must pass the examination prerequisite to certification to practice barbering while "he is a registered apprentice in good standing at the time of application." Section 328.080(4).

If he fails to complete the eighteen months of apprenticeship during such three year registration period, he may be registered as an apprentice in good standing under provisions of Section 328.127 supra.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General



Major General L. B. Adams  
Office of Adjutant General  
Jefferson City, Missouri

Dear General Adams:

This letter is in answer to your request for an opinion of this office on the question of whether duplicate copies of payment requisitions and invoices, the originals of which have been submitted to the State Comptroller, may be destroyed after they have been on file five years or longer.

The State Comptroller is required by Section 33.150 RSMo 1959, to preserve all accounts, invoices and documents approved or to be approved by him. This includes the originals of the payment requisitions and invoices involved in your request. Thus, the originals of those documents are records of the Comptroller's office.

There is no statutory requirement that the Adjutant General shall keep duplicate copies of payments and invoices as records of the Adjutant General. Since those documents are not records of your office there is no duty on the part of your office to preserve them.

As a matter of orderly administration and convenience it is advisable to retain your copies of payment requisitions and invoices for a reasonable length of time. Five years should be sufficient for administrative purposes.

We therefore feel that duplicate copies of payment requisitions and invoices that have been on file in your office five years or longer may be destroyed.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

June 30, 1965



Honorable Patrick J. Hickey  
Representative 3rd District, St. Louis County  
House Post Office  
Capitol Building  
Jefferson City, Missouri

Dear Representative Hickey:

We are in receipt of your request for an opinion of this department dated January 25, 1965. Your request is as follows:

- "1) May a Constitutional Charter City contract with the Metropolitan St. Louis Sewer District to pay a portion of the costs of constructing sanitary sewers within the City Limits?
- "2) May a Constitutional Charter City which lies within St. Louis County and within the territorial boundaries of the Metropolitan St. Louis Sewer District submit a Bond Issue to its voters in order to pay its share of the costs of construction of sanitary sewers which it agreed to do pursuant to an agreement with the M.S.D.?
- "3) May a Constitutional Charter City which received a refund from the Metropolitan Sewer District for transfer of a treatment plant owned by the City, apply said refund towards the cost of improvements in a sub-sewer district which doesn't encompass the entire city?"

We are informed that the City about which you inquire is Berkeley, Missouri, a Constitutional Charter City located within the boundaries of the Metropolitan St. Louis Sewer District (hereinafter referred to as M.S.D.).



Your first two questions inquire as to the power of Berkeley to contract with M.S.D., for the payment of a part of the cost of constructing sewers within the Berkeley City Limits from the general revenue of the City or from the proceeds of a City Bond Issue.

M.S.D. was created by a vote February 9, 1954, under the provisions of Section 30A (4) of Article VI of the Constitution of Missouri and includes all of St. Louis City and a portion of St. Louis County, including all of the City of Berkeley.

The plan upon its effective date of July 1, 1954, became the organic law of the territory within the boundaries of M.S.D., insofar as sanitary and storm water systems and facilities are concerned.

Section 3.010 of the M.S.D. Plan provides as follows:

"Effective on July 1, 1954, and by virtue of the adoption of this Plan by vote of the people of the City of St. Louis and St. Louis County, the existing sanitary and storm water sewer systems and facilities of any and all municipalities, sewer districts, and other public agencies situated within the boundaries of the District, together with all contracts, rights, privileges, interests, easements, books, maps, plans, papers, and records, of whatever description pertaining to or relating to the design, construction, maintenance, operation, or affairs of such existing sanitary and storm water sewer systems and facilities, and title to the same, shall be transferred and dedicated to the use of and be in the possession and under the jurisdiction, control, and supervision of the District under this Plan created and the District is empowered to take title thereto for its use and possession. The District hereunder created shall thereafter have complete title jurisdiction, control, possession, and supervision of such existing sanitary and storm water sewer systems and of all facilities of such municipalities, sewer districts, and other public agencies for the collection and disposal of sanitary sewage and storm water. Provided, however, that the District shall not assume or agree to pay or be liable for any bonded indebtedness of any such municipality, sewer district, or other public agency. Provided, further, that any transfer of title to automobiles, trucks, or other movable equipment used for purposes

of construction, maintenance, or operation of such existing sanitary and storm water sewer systems and facilities, title to land or buildings used exclusively for administering the affairs of such systems and facilities, or title to the furnishings and equipment in such buildings, shall be made by an agreement or agreements between the District and any such municipality, sewer district, or other public agency. Provided, further, that in order to assure continuity of operation and maintenance any such municipality, sewer district, or other public agency shall continue to maintain and operate its existing sanitary and storm water sewer systems and facilities until the Board shall by resolution set a date on which the District shall undertake the maintenance and operation of said systems and facilities, and on and after such date the District shall exclusively operate, maintain, and control said systems and facilities."

Under provisions of such section, title, possession and control of all sewer systems and facilities of all public agencies within the boundaries of M.S.D. was transferred to M.S.D. on July 1, 1954. By such plan, M.S.D. is given broad power to maintain such sewer systems and facilities and to control such sewers and additions, extensions and improvements to the sewer systems and facilities of the District as the Board of Trustees of M.S.D. decides, in its judgment, will provide effective and advantageous sanitary and storm water drainage and adequate sanitary disposal and treatment of sewage.

However, there is nothing in such plan which prohibits a city which has statutory or charter authority from constructing and maintaining sewers in such city after the creation of M.S.D.

Section 3.020 (7) of the M.S.D. plan specifically authorizes M.S.D. to contract with municipalities and other entities for construction, use or maintenance of sewers and sewer facilities. Such Section provides as follows:

"Powers of the District--The District established under the provisions of this Plan shall have power:

"(7) To contract with municipalities, districts, other public agencies, individuals, or private corporations, or any of them whether within or without the District, for the construction, use,

or maintenance of common or joint sewers, drains, outlets, and disposal plants, or for the performance of any service required by the District."

The plans and designs of such sewers and facilities, constructed in whole or part by a municipality, must be approved by M.S.D., and the sewer or drainage facilities cannot be constructed without the approval of M.S.D. This is provided for in Section 3.020 (19) which provides as follows:

"Section 3.020. Powers of the District.--  
The District established under the provisions of this Plan shall have power:

"(19) To approve, revise, or reject the plans and designs of all outfall sewers, trunks, mains, submains, interceptors, lateral sewers, outlets for sewerage, storm water drains, pumping and ventilating stations, and disposal and treatment plants and works proposed to be constructed, altered, or reconstructed by any other person or corporation, private or public, in the District. No such sewer or drainage facilities shall be constructed or reconstructed without the approval of the District. Any such work shall be subject to inspection and supervision of the District."

Section 70.210 Cum. Supp. 63 provides as follows:

"As used in sections 70.210 to 70.230, the following terms mean:

- "(1) 'Governing body', the board, body or persons in which the powers of a municipality or political subdivision are vested;
- "(2) 'Political subdivision', counties, townships, cities, towns, villages, school, county library, city library, city-county library, road, drainage, sewer, levee and fire districts, and any board of control of an art museum."

Section 70.220 RSMo. provides as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or

appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Under provisions of such sections, cities and sewer districts may contract and cooperate for the construction and operation of a public improvement or facility or for a common service provided the subject and purpose of the contract or cooperative action are within the scope of the powers of the municipality and the political subdivision.

Section 9 (21) of Article II of the Charter of Berkeley provides as follows:

"Section 9. Powers--Without limitation of the powers conferred upon the City in ARTICLE I, Section 2, or by any other provision hereof, the Council shall have power by ordinance:

"(21) To contract and cooperate with other municipalities, counties, states, special districts, the United States, or other governmental bodies, singly or jointly, or in districts or associations, for promoting or carrying out any of the powers and functions of the City, or for the acquisition, construction, or operation of any property, equipment, works, plants, or structures convenient or necessary for carrying out any of the purposes or objects authorized by this Charter."

Under this section of the Charter, the city can contract with a sewer district for carrying out of the powers of such city.

We believe that the City of Berkeley has ample authority to construct in whole or part sanitary and storm sewer systems and facilities and can, therefore, enter into a contract for such construction with M.S.D. under Section 70.220 supra and Section 9 (21) of Article II of the Berkeley charter.

The Charter of Berkeley provides in part as follows in Section 9 of Article II:

"Section 9. Powers--Without limitation of the powers conferred upon the City in ARTICLE I, Section 2, or by any other provision hereof, the Council shall have power by ordinance:

"(3) To make public improvements and acquire by condemnation or otherwise, property within or without the corporate limits necessary for such improvements.

\* \* \* \* \*

"(5) To expend the money of the City for all lawful purposes.

"(6) To incur indebtedness for any purpose necessary to the exercise of any power granted by this Charter or by the Constitution and laws of the State of Missouri, by borrowing money or otherwise and to give any appropriate security including negotiable bonds of the City in evidence thereof.

"(7) To exercise the power of eminent domain, including the power of excess condemnation as authorized by the Constitution or by law, and to condemn property, real or personal, or any easement or use therein for public use within or without the City.

\* \* \* \* \*

"(11) To improve water courses and regulate the use thereof.

\* \* \* \* \*

"(13) To provide for the collection and disposal of sewage, offal, ashes, garbage and refuse, or to provide for licensing and regulating such collection and disposal.



\* \* \* \* \*

"(18) To do all things whatsoever necessary or expedient for promoting and maintaining the comfort, education, morals, safety, peace, government, health, welfare, trade, commerce, or industry of the City and its inhabitants."

Section 250.010 Revised Statutes of Mo., applicable to Constitutional Charter Cities provides that such cities can acquire and construct and maintain a sewer system.

Section 250.040 Revised Statutes of Mo., relating to payment for such sewer systems provides as follows:

"The cost to any such city, town or village of acquiring, constructing, improving or extending a sewerage system or a combined waterworks and sewerage system may be met:

- " (1) Through the expenditure by any such city, town or village of any funds available for that purpose;
- " (2) Through the issuance of bonds for that purpose of the city, town or village payable from taxes to be levied by such city, town or village;
- " (3) From the proceeds of special assessments levied and collected in accordance with law;
- " (4) From any other funds which may be obtained under any law of the state or of the United States for that purpose; or
- " (5) From the proceeds of revenue bonds of such city, town or village, payable solely from the revenues to be derived from the operation of such sewerage system or combined waterworks and sewerage system or from any combination of any or all such methods of providing funds."

Under the authority of the Charter of Berkeley and Section 250.010, it is clear that the City of Berkeley has ample authority to construct sewer facilities. The creation of M.S.D. did not in any way preclude the payment in whole or in part of the cost of sewer facilities for cities in M.S.D., but made the construction of such sewer facilities subject to the approval of M.S.D.



Under the provisions of Section 3.020 (7) of the M.S.D. Plan, Section 9 (21) of ARTICLE II of the Berkeley Charter and Section 70.220, RSMo. providing for cooperative agreements, M.S.D. and Berkeley can contract and cooperate for the construction and maintenance of sewer systems and facilities located within the City of Berkeley. Berkeley can, therefore, contract with M.S.D. to pay a portion of the cost of construction of sewers within the Berkeley city limits.

Under the provisions of Section 9 (6) of Article II, of the Berkeley Charter and Section 250.040, Revised Statutes of Mo., the City can issue bonds for construction of sewage facilities.

In the case of Petition of the City of St. Louis, 363 S.W. 2d, 612, the Supreme Court of Missouri upheld the right of the City of St. Louis to issue bonds for construction of sewers in such City. In that case, the sewer bond issue was authorized by a vote August 1, 1944. Part of the bonds were issued by the City prior to July 1, 1954, the effective date of the M.S.D. Plan.

On November 22, 1961, an ordinance was passed by the City of St. Louis authorizing the issuance of the remainder of such bonds. It was alleged by those opposing the issuance of such bonds, that the adoption of the M.S.D. Plan terminated any authority of such City to issue bonds for construction of sewers. The Court in speaking of the M.S.D. Plan and this contention said l.c. 615 and 616:

"[1] While it is true that, under Sec. 3.010 of Article 3 of said Plan, all existing sanitary and storm-water sewer systems and facilities of any and all municipalities, sewer districts and other public agencies within the boundaries of said District were transferred to and dedicated to the use of and under the jurisdiction, control and supervision of the Metropolitan St. Louis Sewer District, nevertheless, Sec. 3.020, subdivision 7, of Article 3, of the Plan, fixing the powers of the District, expressly provides that the new District shall have power 'To contract with municipalities, districts, other public agencies, individuals, or private corporations, or any of them whether within or without the District, for the construction, use or maintenance of common or joint sewers, drains, outlets, and disposal plants, or for the performance of any service

required by the District.' It is under this provision that the contract of March 1, 1962, was entered into between the District and the City of St. Louis, in pursuance of Ordinance No. 50678 of the City of St. Louis, as enacted on November 22, 1961, providing for the issuance of the remaining bonds authorized by the election of August 1, 1944. And see Section 3, subdivision 19, of the Plan to the effect that no sewer or drainage facilities may be constructed or reconstructed in the District without the approval, supervision and inspection of the District. The Plan provides for its own method of construction and improvement of all sanitary and storm-water sewers in said District, and expressly provides that, if any existing municipality, sewer district or other public agency situated within the District shall on July 1, 1954, have outstanding and unpaid any sewer bonds or liabilities, the creation of the District under this Plan they shall not be affected; and that the transfer and dedication of the sewer systems and facilities of any municipality, sewer districts or other public agency, to the uses and purposes of the District, shall not affect or alter in any way the said bonds or liabilities, nor shall it affect or alter the rights or obligations thereunder (Sec. 12.090, Article 12 of the Plan). It is also true that the City of St. Louis cannot exercise the same power, jurisdiction and control over sewers that it previously exercised and that it cannot exercise such powers concurrently with the Metropolitan St. Louis Sewer District in the same territory (see *Wellston Fire Protective Dist. of St. Louis County v. State Bank & Trust Co. of Wellston, Mo.* App., 282 S.W.2d 171, 175 (7); *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 2, Sec. 7080, pp. 269, 270), nevertheless these facts do not exclude the City of St. Louis from cooperation with the Metropolitan St. Louis Sewer District, as provided in Sec. 3.020 (7) of the plan, nor do these facts prevent the city from entering into a contract such as was entered into between the city and the District on March 1, 1962, or from passing and putting into effect

on November 22, 1961, Ordinance No. 50678 of the City of St. Louis providing for the sale of the remaining unissued bonds, as authorized by the election held on August 1, 1944. We find nothing in the Plan of the Metropolitan St. Louis Sewer District, as adopted at the special election held on February 9, 1954, effective July 1, 1954, which prevents the issuance of the remaining bonds authorized in 1944, nor should the adoption of the mentioned Plan be held to prevent the city's cooperation with the new District. Appellant's first assignment must be and is over-ruled."

The holding of the Supreme Court in this case was not, in our view, based on the fact that the bonds were authorized prior to the creation of M.S.D., but were not issued until after such creation but was based on the fact that the provisions of the M.S.D. Plan, itself recognized the right of construction of sewer facilities by municipalities when authorized by statute or by charter. We believe such case is authority for holding that a bond issue of a city for payment of all or a part of the cost of construction of sewers within such city is authorized even though such city is now within M.S.D.

It follows that the City of Berkeley can within constitutional limits issue bonds for a part of the cost of construction of sewers to be jointly constructed and maintained under a cooperation agreement between M.S.D. and Berkeley.

In your third question you inquire whether Berkeley may apply a refund received by such City from M.S.D., in payment for transfer to M.S.D. by the city of a treatment plant owned by the City to pay for construction of sewers in a M.S.D. Sub-district located in a part of the City of Berkeley.

Section 12.090, of the M.S.D. Plan provides in part as follows:

"If the District shall at any time use any existing sewage treatment or disposal plant to serve any area or areas not situated within the boundaries of the municipality, sewer district, or other public agency which constructed said plant, and at such time said municipality, sewer district, or other public agency has outstanding and unpaid

any bonds which were issued wholly or partly for the construction of said plant, the Board shall ascertain what proportion of the proceeds of such bonds were expended for said plant. Thereafter and until such time as the District shall discontinue the use of said plant, a corresponding proportion of the remaining principal and interest charges on such bonds shall be borne by a subdistrict. Such subdistrict shall be established as provided in this Plan and shall include the area situated within said municipality, sewer district, or other public agency and any other area or areas served by said plant. The Board shall by ordinance impose the taxes or charges within the subdistrict necessary to pay such principal and interest."

It is our understanding that a sewage treatment plant belonging to Berkeley was transferred to M.S.D., and that such sewage treatment plant had been constructed from part of the proceeds of a City of Berkeley Sewer Bond Issue and under the provisions of Section 12.090 of the M.S.D. Plan, M.S.D. agreed to make payment of a portion of the outstanding bonds of the City.

It is not clear to us whether the contract between Berkeley and M.S.D., under the provisions of Section 12.090, of the M.S.D. Plan provides that M.S.D. shall pay to the City an annual sum or whether the contract provides that M.S.D. will pay such sum of money directly to bond holders of the Berkeley Sewer Bonds.

If the contract provides that Berkeley receives a certain amount of money from M.S.D., which is placed in the general revenue of Berkeley, such funds can be spent by the city for all or part of the cost of construction of sewers as is pointed out in the answer to the first two questions.

If the contract provides that M.S.D. is to pay such sum directly to the holders of Berkeley Sewer Bonds, then such funds do not ever become City Funds and cannot be spent to pay for the cost of the construction of sewers.

It is the view of this office that the Constitutional Charter City of Berkeley which is within the Metropolitan St. Louis Sewer District may contract with the District to pay a portion of the cost of constructing sanitary sewers within such City. It is further the opinion of this office that the City of Berkeley may issue bonds to pay part of the cost of construction of sanitary sewers within

Honorable Patrick J. Hickey -12-

such City in cooperation with the Metropolitan St. Louis Sewer District.

It is further the opinion of this office that the City may build sewers from monies in the general revenue but such City cannot expend for sewers monies paid directly to the holders of city sewer bonds by the Metropolitan St. Louis Sewer District.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

CEB:fs



SCHOOLS:  
SCHOOL DISTRICT:  
COUNTY SCHOOL BOARD:  
ELECTIONS:

Under Section 165.657, RSMo. Cum. Supp. 1963, an election of county board of education members must be held the first Tuesday in April, 1965, in the Springfield R-12 and all other school districts of Greene County and all districts of counties of the 2nd, 3rd, and 4th class. The fact that members of the Springfield R-12 Board of Education are elected biennially in even-numbered years does not affect the right of the voters of the Springfield R-12 district to vote annually upon county board members.

OPINION NO. 98

March 17, 1965

Honorable Rolland L. Comstock  
State Representative  
Greene County, 3rd District  
2327 North Fremont  
Springfield, Missouri



Dear Mr. Comstock:

This official opinion is issued in response to your request of February 3, 1965. You inquire:

- "1. Must he [county superintendent] conduct a special election for the election of two members of the County Board of Education on the 1st Tuesday of April, 1965? I believe there is some confusion about the use of the word 'annual' election in the statute since prior to the law there was no 'annual' election.
- "2. Can patrons of Springfield R-12 School District vote for County Board members at election in April, 1965?
- "3. If patrons of R-12 cannot vote on County Board members, are decision by the County Board of Education affecting the Springfield district legal?
- "4. Can patrons of R-12 vote for members of the County Board of Education in the 1966 election since at that time R-12 will be having its own election? I am assuming that county and R-12 members will be elected at the same election."

You inform us that the Springfield R-12 School District elects its directors biennially for six-year terms (in even-numbered years) and that the other districts in Greene County elect their directors annually.



Honorable Rolland L. Comstock, Representative

Section 165.657 (4), RSMo. Cum. Supp. 1963, provides:

"4. There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. \* \* \* " (Emphasis added)

Section 165.657 clearly provides that county board of education elections shall be held annually. The holding of that election is not affected by when other elections must be held. Presidential elections are every four years. State, county and municipal officers are elected at various intervals. Bond elections may be held at almost any time. However, these in no way affect the date of holding the county board of education election. Likewise, the holding of local school board elections does not affect the county board election.

Rather than hold the county board elections on a separate day, the legislature set them on the same day as the annual local school elections. Apparently their purpose was to prevent extra expense and for the convenience of the approximately 1,300 school districts of this state which hold annual school elections. To our knowledge only two districts (St. Joseph and Springfield) wherein county board elections must be held do not hold annual elections.

Your four questions are answered by one basic inquiry, does the fact that members of the Springfield R-12 school board are elected biennially affect the holding of the county board of education election which is held annually?

The Constitution of this State provides:

Article VIII, Section 2 -

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people \* \* \*."

Honorable Rolland L. Comstock, Representative

Article I, Section 25 -

" \* \* \* all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Section 165.657 (4) clearly provides that two members of the county board of education in each second, third and fourth class county shall be elected the first Tuesday of April each year. No person or official is authorized by law to determine whether or not this election should be held. The election is called per force of the statute. Anyone who interfered with the rights of qualified voters to cast their ballots for county board members would be subject to the legal penalties for such interference.

The Greene County Board of Education has jurisdiction over Springfield R-12 and the other school districts of Greene County. The voters of these school districts have the right to vote upon these officials. Thus, an election must be held on the first Tuesday of April, 1965.

We note that House Bill 301, presently pending before the 73rd General Assembly, would amend Section 165.657. This amendment provides for the election of county board members in second class counties by the members of the local school boards rather than a popular vote. However, until enacted, this Bill does not change the present law nor the conclusions we have here reached.

CONCLUSION

Therefore, it is the opinion of this office that under Section 165.657, RSMo. Cum. Supp. 1963, an election of county board of education members must be held the first Tuesday in April, 1965, in the Springfield R-12 and all other school districts of Greene County and all districts of counties of the 2nd, 3rd and 4th class. The fact that members of the Springfield R-12 Board of Education are elected biennially in even-numbered years does not affect the right of the voters of the Springfield R-12 district to vote annually upon county board members.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Opinion No. 100 answered  
by letter. (Randolph).

February 10, 1965



Major John W. Howland  
Assistant Director of Facilities  
Missouri National Guard  
Adjutant General's Office  
Jefferson City, Missouri

Dear Major Howland:

The form of License Agreement between the Missouri National Guard and the City of St. Clair for the purpose of allowing the city to install a water main on the armory property in St. Clair, Missouri, copies of which you forwarded to this office together with your letter of January 26, 1965, is hereby approved as to form and legality.

This office is retaining for our files one of the copies of the agreement that you forwarded to us.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure

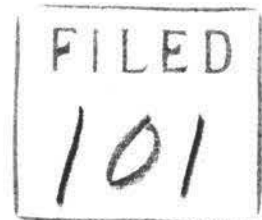
DRIVER'S LICENSE:  
LICENSES:  
REVOCATION OF DRIVER'S LICENSE:

The enforcement of a suspension or revocation of a person's driving privilege made by the Director of Revenue under Chapter 302, RSMo 1963 Cum. Supp. is not automatically stayed by an appeal thereof. However, if the reviewing court grants a stay of the Director's order, the enforcement thereof is stayed during the appeal and resumes when a final decision is rendered, if the court, after review, upholds the action of the Director of Revenue.

OPINION NO. 101

April 6, 1965

Mr. Thomas A. David, Director  
Department of Revenue  
Operator and Chauffeur License  
P. O. Box 200  
Jefferson City, Missouri 65102



Dear Mr. David:

This is in answer to your request for an opinion of this office concerning the beginning date of a suspension or revocation of a person's driving privilege in cases where the suspension or revocation has been appealed and the court, after review, upholds the action of the Director of Revenue.

Section 302.304, RSMo Cum. Supp. 1963, provides for the suspension and revocation of driving privileges upon the accumulation of an excess number of points under our Missouri Point System. Points are assessed after a conviction or forfeiture of bail, Section 302.302, RSMo Cum. Supp. 1963. Section 302.225, RSMo Cum. Supp. 1963, requires courts having jurisdiction over offenses for which points are assessed to forward to the Director of Revenue a record of the convictions of persons in the court within ten days thereafter. After the assessment of a sufficient number of points, the Director sends out a notice of suspension or revocation, as the case may be. The beginning date of such suspension or revocation is specified in the notice. It is our understanding that this beginning date is usually set approximately seven days after the notice is sent.

Mr. Thomas A. David

The revocation or suspension should begin on the date specified in the notice even though the case is appealed, unless a court order is made to the contrary. The fact that an appeal is made does not automatically stay the suspension or revocation order during the course of such appeal. However, one taking an appeal may and usually does ask the court to stay enforcement of the Director's order pending a final decision. See Section 536.120, RSMo 1959 which provides that the reviewing court has the power to stay the enforcement of the administrative order being appealed. If no stay is granted by the court, the Director's order remains in effect even though an appeal has been taken, and the necessary steps should be taken to secure the miscreant's drivers license.


If a stay is granted, the enforcement of the Director's order should be suspended according to the terms of the order. Ordinarily the Director's order is tolled on the date of the stay order and resumes when a final decision is rendered, presuming, of course, that the Director's order has been upheld. If the court stays the Director's order, prior to its specified beginning date, the suspension or revocation will begin after a final decision by the court on review upholding the action of the Director. If a stay is granted after the specified beginning date, the remainder of the suspension will be served after a final decision upholding the Director's order. If a suspension for a sixty day period, for example, is stayed ten days after the beginning date set out in the notice, the suspension is continued for fifty days after a favorable final decision.

#### CONCLUSION

The enforcement of a suspension or revocation of a person's driving privilege made by the Director of Revenue under Chapter 302, RSMo Cum. Supp. 1963, is not automatically stayed by an appeal thereof. However, if the reviewing court grants a stay of the Director's order, the enforcement thereof is stayed during the appeal and resumes when a final decision is rendered, assuming the court, after review, upholds the action of the Director of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

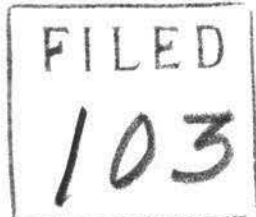
JHD:bf



OPINION NO. 103  
Answered by Letter - Peterson

March 22, 1965

Honorable Charles H. Dickey, Jr.  
State Representative, Audrain County  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Dickey:

Recently you referred to this office a letter written to you by Mr. Lee Alford Stoutz of Vandalia, Missouri. The contents of the letter indicated that Mr. Stoutz was interested in fluoridating the public water supply of Vandalia. Mr. Stoutz also expressed several questions concerning implementation of such a fluoridation program.

The following discussion will clarify some of the matters raised by Mr. Stoutz. The powers of a municipality are derived from a delegation of power by the state. A fourth-class city has only powers conferred on it by the state in statutes. State ex rel City of Republic v. Smith, 345 Mo. 1158, 139 SW 2d 929. Vandalia, Missouri is a fourth-class city. Official State Manual of Missouri, 1963-64, page 1169. The delegation of authority from the state to fourth-class cities is found in Chapter 79, RSMo 1959. Chapter 79, RSMo 1959, provides for the mayor-board of aldermen type of local government. The legislative power of a city of the fourth class, vested in a board of aldermen and mayor, can be exercised only by ordinance. City of Jackson, to Use of Cape County Savings Bank v. Houck, 226 Mo. App. 835, 43 SW 2d 908.

Fluoridation of the public water supply for the purpose of controlling the disease known as dental caries has been the subject of the following Missouri cases. Readey v. St. Louis County Water Company, Mo., 352 SW 2d 622, and State ex rel Whittington v. Strahm, Mo. (banc) 374 SW 2d 127. The addition of fluoride compounds to the public water supply in the above cases was avowed to be in the interest of public health and welfare. Ordinances enacted to protect the public health and general welfare are considered to be a valid exercise of police power. City of St. Louis v. Evans, Mo., 337 SW 2d 948. The police powers delegated to fourth-class cities are set out in Sections 79.370 - 79.480, RSMo 1959, and Sections 71.680 - 71.780, RSMo Supp. 1961. The above



Honorable Charles H. Dickey, Jr.    -2-

statutes, particularly applicable to regulating the public health matters of fourth-class cities specifically, are Sections 79.370 - 79.390, RSMo 1959, and to all cities generally, Sections 71.700 - 71.710, RSMo 1959.

It should be noted that referendum is not applicable to cities of the fourth class. Enclosed are two opinions issued by this office on the matter of referendum in fourth-class cities; one opinion is addressed to Representative Young, dated December 1, 1961, and a subsequent opinion, addressed to Representative Cantrell, dated September 25, 1962.

This office has issued opinions relating to fluoridating water supplies on two different occasions. Enclosed you will find a copy of an opinion addressed to the Honorable Harold W. Barrick, dated July 14, 1954. Enclosed also is an opinion addressed to the Honorable James R. Amos, dated September 17, 1953. The July 14, 1954 opinion concerns whether or not Missouri law prohibits fluoridation of public water supply. The September 17, 1953 opinion interprets particular Missouri statutes in relation to fluoridation.

To our knowledge, no cases in Missouri have ruled on whether fourth-class cities have power to fluoridate its water supply.

Very truly yours,

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NORMAN H. ANDERSON  
Attorney General

Enclosures (4)

WAP:mac

TAXES--CREDIT UNIONS:  
TAXES--SAVINGS AND LOAN ASSOCIATIONS:  
REFUNDS--CREDIT UNIONS:  
REFUNDS--SAVINGS AND LOAN ASSOCIATIONS:  
CREDIT UNIONS--OVERPAYMENT OF TAXES:  
SAVINGS AND LOAN ASSOCIATIONS--  
OVERPAYMENT OF TAXES:

Credit may not be allowed and refund cannot be made to Credit Unions and Savings and Loan Associations for overpayment of taxes paid under Chapter 148. Refunds can be claimed by individual members of such institutions.

April 16, 1965

OPINION NO. 106

Mr. Thomas A. David  
Director of Revenue  
Department of Revenue  
Jefferson City, Missouri



Dear Mr. David:

Reference is made to your request for an opinion in regard to issuing refunds or credit slips for taxes overpaid by Credit Unions and Savings and Loan Associations. Your request is stated as follows:

"We request an official opinion from you with reference to issuing refunds or credit slips for taxes overpaid by Credit Unions and Savings and Loan Associations.

"In reading Revised Statutes of Missouri, 1959, Chapter 148, which pertains to Credit Unions and Savings and Loan Associations, we fail to find any reference to refund of taxes overpaid or the issuing of credit slips. Please advise if this office can allow a refund, or issue credit slips; also, advise relative to the application of the statute of Limitation for the period in which to apply for such refund or credit."

Section 148.250 RSMo 1959, imposes a tax upon each person holding an account in a Credit Union. The amount of the tax is two per cent of the taxable portion of the dividends credited to the account of each person. Section 148.270 RSMo Cum. Supp. 1961, requires the Credit Union to compute, withhold and pay the amount of taxes imposed upon the members of the Credit Union by Section 148.250. Therefore, although the credit union is required to withhold and pay the tax, the tax is imposed against the individual members of the credit union who is the taxpayer.

Mr. Thomas A. David

Similar provisions apply to Savings and Loan Associations under Sections 148.480 and 148.500 RSMo 1959. A tax imposed upon the members of a Savings and Loan Association must be computed, withheld and paid by the Association.

The statutes make no provision for the issuance of credit slips for taxes overpaid by credit unions and savings and loan associations for the members of these institutions. Therefore, credit slips cannot be issued for such overpayment of taxes.

Section 136.035 RSMo 1959, provides as follows:

- "1. The director of revenue from funds appropriated, shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.
- "2. The director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.
- "3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded."

It is our opinion that the refunds provided for in this section may be claimed only by the taxpayer upon whom the tax is imposed. In as much as the tax provided for in Chapter 148 is not imposed upon credit unions and savings and loan associations, such institutions cannot claim refunds for the overpayment or erroneous payment of taxes. The individual members of credit unions and savings and loan associations may claim refunds for the overpayment or erroneous payment of taxes within two years from the date of payment. Section 136.035 (3).

Mr. Thomas A. David

CONCLUSIONS

The Director of Revenue cannot issue credit slips for taxes overpaid by credit unions and savings and loan associations. Refunds for the overpayment or erroneous payment of taxes may not be made to credit unions or savings and loan associations for taxes paid pursuant to Chapter 148 RSMo. Refunds by the Department of Revenue for the overpayment or erroneous payment of taxes may be made to the individual members of credit unions and savings and loan associations who are the taxpayers for taxes overpaid pursuant to Chapter 148. Claims for such refunds must be filed with the Director of Revenue within two years from the date of the payment of the taxes.

The foregoing opinion which I hereby approve was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

TAXES--BANKS AND CREDIT INSTITUTIONS: Credit for overpayment of  
REFUNDS--BANKS AND CREDIT INSTITUTIONS: taxes paid under Chapter  
BANKS--OVERPAYMENT OF TAXES: 148 by banks and credit  
CREDIT INSTITUTIONS--OVERPAYMENT OF institutions may be allowed  
TAXES: only upon examination of  
returns for the current

year. Refund of such overpayment may be claimed within two years  
of payment.

OPINION NO. 107

May 26, 1965

Mr. Thomas A. David  
Director of Revenue  
Department of Revenue  
Jefferson City, Missouri



Dear Mr. David:

Reference is made to your request for an official opinion  
from this office in regard to tax credits issued for taxes over-  
paid by banks and credit institutions. Your request is stated  
as follows:

"In reading Chapter 148 of the Revised  
Statutes of Missouri, 1959, with reference  
to Banking Institutions and Credit Insti-  
tutions, we find in sections 148.060 and  
148.180 that credit for overpayment can be  
allowed by the director. We fail to find  
however, the number of years on which credit  
can be given. Please advise relative to the  
application of the statute of Limitation for  
the period in which to apply for such refund  
or credit."

As related to banking institutions, the provision for a  
credit for overpayment of taxes under Chapter 148 is made in  
Section 148.060 RSMo 1959 as follows:

"2. Upon the filing of such return the full  
amount of any tax as computed by the taxpayer  
shall be paid to the director, who as soon as  
is practicable thereafter shall examine it  
and determine the correct amount of the tax.  
If the director determines that the taxpayer  
has paid a tax in excess of the amount lawfully  
due, the director shall permit a credit."

As related to credit institutions, an identical provision  
is included in Section 148.180.

Mr. Thomas A. David

These statutes provide that the Director of Revenue shall examine the tax returns as soon as practicable after the returns have been filed. Upon such examination, the Director shall permit a credit to the taxpayer for the overpayment of taxes lawfully due. Thus, if it appears that a taxpayer has erroneously or inadvertently failed to claim a lawful deduction, the Director shall allow the deduction, determine the amount of overpayment and permit a credit. However, Sections 148.060 and 148.180 do not provide for the allowance of a credit for overpayment when such overpayment does not appear from the director's examination of the return. Therefore, the credit provided by these sections does not apply to overpayments for past years which come to the attention of the taxpayer through an examination of his own records in view of the applicable law.

Refunds for the overpayment of taxes generally is provided for in Section 136.035 RSMo 1959 as follows:

"1. The director of revenue from funds appropriated, shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.

"2. The director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.

"3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded."

Your letter recites the following situation to which a refund or credit may apply to a bank.

"Situation A. We have a request from a bank wanting to know how many years credit can be



Mr. Thomas A. David

allowed on the amortization of their bond premiums. Beginning in 1956 on income earned in 1955, they failed to deduct their amortization which, under the Bank Tax Law they are entitled to do."

Section 148.040 RSMo 1959, provides that amortization of premiums on bonds by a bank shall be allowed as a deduction in computing net income subject to the tax. Therefore, the bank's failure to deduct amortization of premiums on bonds resulted in an overpayment or erroneous payment of tax as contemplated by Section 136.035. Said section provides that claims for refunds must be filed with the Director of Revenue within two years from the date of payment. Thus, although erroneous overpayments of taxes have been made continuously since 1956, claims for refunds are limited to two years from the date of payment.

Your letter recites the following situation in regard to credit institutions:

"Situation B. Our request for Credit Institution Tax credit is based on actual bad debts not deducted on the Institution Tax return filed in the year 1962, said return being based on the results of operations for the year 1961."

Section 148.150 allows credit institutions to deduct bad debts in computing net income subject to the tax. Therefore, failure of the credit institution to deduct bad debts results in an overpayment or erroneous payment of taxes subject to refund pursuant to Section 136.035. Claims for refunds must be filed with the Director within two years from the date of payment. Therefore, no refund may be allowed at this time for overpayment of taxes by a credit institution made pursuant to a return filed and taxes paid in the year 1962.

#### CONCLUSIONS

Credits for overpayment of taxes by banks permitted under Section 148.060 and for overpayment of taxes by credit institutions permitted under Section 148.180 can be made by the Director of Revenue upon the examination of returns for the current year as such returns are filed in his office. Credits for overpayment of taxes by banks and credit institutions may not be made by the Director of Revenue pursuant to claims made by banks or credit institutions for prior years. Refunds may be made to banks or credit institutions for overpayment or erroneous payment of taxes within two years from the date of such payment pursuant to Section 136.035.

Mr. Thomas A. David

The foregoing opinion which I hereby approve was prepared  
by my Assistant, Thomas J. Downey.

Very truly yours,

*Norman H. Anderson*  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 108  
Answered by Letter - Denman

March 1, 1965



Reuben R. Rhoades, D.D.S.  
Secretary, Missouri Dental Board  
506 Central Trust Building  
Jefferson City, Missouri

Dear Doctor Rhoades:

This is in answer to your request for an opinion of this office which reads as follows:

"The Missouri Dental Board would like to request an opinion from your office covering state institutions, namely, Missouri Board of Health, Board of Corrections, state hospitals and institutions, etc., who employ dentists. These dentists receive no remuneration from patients, only the salary paid by the state.

"Do dentists so employed need to be licensed by our Board to hold these positions?"

Section 332.020, RSMo., states that no person shall practice dentistry or hold himself out as a dentist in this state until he has complied with certain requirements among which is that

"(1) He has been duly registered by the board and granted a certificate of registration."

Presuming that dentists employed as stated in your letter practice dentistry as it is defined in Section 332.010, RSMo. 1959, they are required to be licensed just as any other dentist.

Reuben R. Rhoades, D.D.S.

The fact that they are paid by the state on a salary basis does not absolve them from the usual requirements applicable to other dentists.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JHD: kd

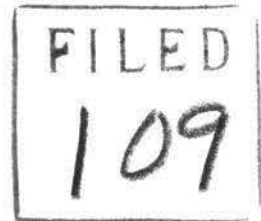
DEPUTY SECRETARY OF STATE:  
FACSIMILE SIGNATURE:  
SECRETARY OF STATE:  
SIGNATURE:

Secretary of State may affix his printed facsimile signature to documents required to be attested to or issued by his office, if it is followed by the handwritten signature of Deputy Secretary of State as designated by the Secretary of State.

OPINION NO. 109

April 19, 1965

Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

Recently your office requested an opinion of this office regarding the use of a printed facsimile signature on certain documents that must be attested to or issued by your office in considerable volume. You attached a notary public commission form and various forms used in the corporation department.

The question may be restated as follows:

"May the Secretary of State substitute a printed facsimile of his signature for his written signature to documents that must be attested to or issued by his office, if followed by the handwritten signature of the Deputy Secretary of State?"

The Secretary of State is authorized by Section 28.030, RSMo Cum. Supp. 1963, to appoint a Deputy Secretary of State:

"\* \* \*who shall possess all the powers and perform any of the duties prescribed by law to be performed by the secretary of state, when and for such periods of time as the secretary of state may designate. \* \* \*"

The Secretary of State is authorized under this section to delegate to his deputy any power and duty that the secretary has to sign documents. Such signature by the deputy, if authorized by the secretary, would have the same effect as the handwritten signature of the Secretary of State.

CONCLUSION

Therefore, it is the opinion of this office that the Secretary of State may affix his printed facsimile signature to documents required to be attested to or issued by his office, if it is followed by the handwritten signature of the Deputy Secretary of State as designated by the Secretary of State.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jeremiah D. Finnegan.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



March 30, 1965

FILED

114

Honorable Clifford A. Falzone  
Prosecuting Attorney Randolph County  
220½ West Reed Street  
Moberly, Missouri

Dear Mr. Falzone:

We are in receipt of your letter of February 9, 1965, wherein you state that Randolph County is a county of the third class, and is contemplating redistricting the county from which the two judges of the county court are elected pursuant to Section 49.010 RSMo, 1959. Randolph County does not have Township Organization form of government. You refer to Section 49.010 RSMo, 1959, which section prohibits the county court from dividing a municipal township.

You state that in order to equalize the two districts it would be necessary to subdivide an existing township under Section 47.010 RSMo, 1959, and that it appears to be necessary that the township in which the city of Moberly is located be divided because such township contains more than a half of the population of the county. This would result in the city of Moberly being divided between each of the two newly created townships.

You request that we send you Attorney General Opinion No 5, Barker, 6-19-52, and pursuant to your request we are enclosing a copy of that opinion. We are also enclosing a letter written to Larry M. Woods under date of December 27, 1962, relating to County Judge Districts.

Under the authority of Section 47.010 RSMo, 1959, the County Court may divide the county into convenient townships or subdivide already existing townships.

It appears that it is your present plan to create two townships out of the present single township in which the city of Moberly is located, and we believe this is authorized under the above quoted section.

The case of State ex inf. McKittrick vs. Tegethoff, 338 Mo. 328, 89 S.W. 2d 666, cited in the Barker opinion (attached hereto), holds that a county court may increase the number of townships or may change the boundary lines of the existing townships without a written petition of the residents of the townships.

It further appears that it is your present plan, that after the revision of the townships under Section 47.010, supra, the county court will then proceed to divide the county into "two districts, of contiguous territory, as near equal in population as practicable," as provided in Section 49.010 RSMo 1959. The new district line will then coincide with the new township line, previously created, which divides the city of Moberly. Thus the redistricting by the county court of Randolph County will not divide any municipal townships.

We believe that the attached opinion will confirm the conclusion we have reached and that this is the information you desire.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

CHS/sj

Enclosure

April 13, 1965



Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri

Dear Mr. Paul:

This is in answer to your request for an official opinion of this office which asks whether road and bridge money received by the County Treasurer of McDonald County for special road districts should be disbursed directly to the special road district against the county, which is not under township organization.

Subsection 1 of Section 233.195, RSMo Supp. 1963, relates to the portion of tax set aside for benefit assessment special road districts in counties not under township organization as follows:

"1. County Courts shall cause to be set aside and placed to the credit of each road district so incorporated four-fifths of such part or portion of the tax arising from and collected and paid upon any property lying and being within any such district, by authority of section 137.555, RSMo. All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law."

Section 137.555, RSMo 1959, referred to in the Section, supra, reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

Thus, this section provides that the amount placed to the credit of the special road district from which it arose shall be paid out to the special road district only upon warrants of the county court in favor of the commissioners or treasurer of the district.

Section 233.125, RSMo 1959, concerns the dispositions of proceeds from certain county licenses collected on pool and billiard table and taxes collected on property as provided for in Section 137.555, RSMo 1959, for eight mile road districts. This section is as follows:

"In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under sections 233.010 to 233.165, and where money shall be collected for road and bridge purposes under the provisions of section 137.555, RSMo, upon property within such special road district, or districts, or where money shall be collected for pool or billiard table licenses upon any business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, four-fifths of such part or portion of said road and bridge tax so arising from and collected and paid upon any property lying and being within any such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for four-fifths of such part or portion of said road and bridge tax so collected upon property lying and being within such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district, or districts."

Thus, under this section, the county court shall, upon application of the eight mile special road district commissioners, draw warrants on the county treasury payable to the commissioners or the treasury of the eight mile special road districts.

Your second question asks whether the recipient, for the road district, of these funds should be under bond. Section 233.055, RSMo 1959, requires that the treasurer of the eight mile special road district be bonded in an amount fixed by the board of commissioners of the district. There is no other provision for the bonding of the commissioners of an eight mile special road district.

Section 233.185, RSMo 1959, which relates to benefit assessment special road districts in counties not under township organization provides that the county treasurer shall be the treasurer of the board of commissioners and that he shall be responsible on his bond. There is no other provision for the bonding of the commissioners of a special road district in a county not under township organization.

Yours very truly,

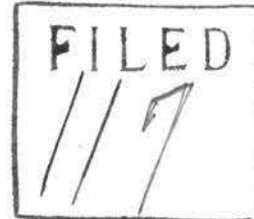
NORMAN H. ANDERSON  
Attorney General

TEE:mac



OPINION NO. 117  
Answered by Letter  
(Chitwood)

May 24, 1965



Honorable Harold L. Fridkin  
County Counselor  
Jackson County  
Suite 205 Court House  
Kansas City, Missouri 64106

Dear Mr. Fridkin:

This office is in receipt of your request for a legal opinion in which three of the four inquiries concern the appointment of Class "C" and special deputy coroners by the Jackson County Coroner. The fourth inquiry is in regard to the equipping of a laboratory in a non-county hospital, at the expense of Jackson County, Missouri. Each of said inquiries will be considered and answered herein.

In an opinion of this office written for Honorable William A. Collet, Prosecuting Attorney of Jackson County, Missouri, on November 21, 1958, it was concluded the Jackson County Coroner was unauthorized to appoint "special deputy coroners" except to fill positions created by statute.

Said opinion pointed out that Section 58.150 RSMo 1949, (substantially the same as Section 58.150 RSMo Cum. Supp. 1963, except for increased compensation of deputy coroners), created "special deputy" and "extra deputy" positions with statutory compensation. Since the statute did not grant the coroner power to appoint "no compensation" special deputies and extra deputies, he was unauthorized to appoint such "no compensation" deputies. A copy of this opinion is enclosed, and is believed to answer your third inquiry in the negative.

Your first inquiry asks if the Jackson County Coroner can appoint peace officers as Class "C" deputy coroners, who are to receive no compensation, other than that received from their respective sheriff or police departments.

The coroner is authorized by Section 58.150 RSMo Cum. Supp. 1963, to appoint deputies in Class A, B, C, and D, and to fix their compensation within the limits provided therein. It is noted the section mentions the appointment of compensated Class "C" deputies, consequently, for the same reasons given in the enclosed opinion, the coroner is unauthorized by said section to appoint Class "C", no compensation deputies, and our answer to the first inquiry is in the negative.

The second inquiry asks, if the coroner can appoint such Class "C" deputies to serve without compensation as aforesaid, can Jackson County, Missouri, pay for their training and necessary equipment for such training, at the University of Missouri at Kansas City, Missouri. Obviously this inquiry is based upon an affirmative answer being given to the first inquiry. Inasmuch as a negative answer was given to the first inquiry, it is believed to be unnecessary to answer the second one.

The fourth inquiry asks if the Jackson County Coroner can use funds received from Jackson County, Missouri, to purchase a toxicology laboratory, with ownership of the laboratory in a non-county hospital, where it is located, for use of the hospital and such coroner.

We understand the "funds received from Jackson County, Missouri," are those belonging to the county, regardless of the kind or class of county funds from which they might be taken.

No information is given in the inquiry concerning the hospital, except that it is described as "a hospital other than a county hospital." Regardless of the ownership of such hospital, the answer to the inquiry is the same.

The fourth inquiry involves the proposition as to whether a county or other political subdivision of the State of Missouri may grant public money or property to a private person, association or corporation.

A contribution of this kind has been held to be a violation of Article VI, Sections 23 and 25, Constitution of Missouri, by the Courts, unless the contribution falls within the exceptions stated therein, (said exceptions are inapplicable here and will not be quoted).

In an opinion of this office written for Honorable James T. Riley, Prosecuting Attorney of Cole County, Missouri, on February 29, 1952, the above mentioned Constitutional provisions were quoted and discussed, and in which it was pointed out said sections did not permit a political subdivision of the state to contribute public money or property to a private corporation. It was concluded that no Missouri County can contribute or give away public funds to the "Executive Committee of the Greater Jefferson City Committee, Inc.," a private corporation.

The factual situation involved in said opinion differs from the one now under consideration, yet the legal principles involved in each are the same, and for the same reasons given in such opinion, our answer to the fourth inquiry herein, is in the negative.

This view of the law, however, does not mean to say that no legal way can be found to accomplish the same or similar result. However, we feel compelled to limit our answer to the precise inquiry submitted.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosures (2)

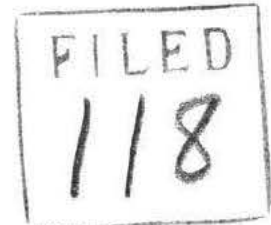
PNC/sj

SEWER DISTRICT BONDS:  
METROPOLITAN SEWER DISTRICT BONDS:  
SECURITY:  
STATE DEPOSITORIES:  
STATE FUNDS:  
BANKS:

Bonds of Metropolitan Sewer  
District not eligible as security  
for state deposits in banks.

OPINION NO. 118  
Answered by Letter - Eichhorst

March 5, 1965



The Honorable M. E. Morris  
State Treasurer of Missouri  
Jefferson City, Missouri

Dear Mr. Morris:

This is in answer to your request for an official opinion  
of this office, which asks:

"Whether or not the Metropolitan Saint  
Louis Sewer District bonds are eligible  
as security for State of Missouri funds  
deposited in banks."

Subsection 1 of Section 30.270, RSMo 1959, provides for  
the security for the safekeeping of state funds, listing  
twelve specific kinds of securities that are acceptable for  
that purpose. This subsection reads as follows:

"1. For the security of the moneys de-  
posited by the state treasurer under the  
provisions of this chapter, the governor,  
the state auditor and the state treasurer  
shall require of the selected and approved  
banks or banking institutions as security  
for the safekeeping and payment of deposits,  
securities of the following kind and  
character:

(1) Bonds or other obligations of the  
United States,

(2) Bonds or other obligations of the  
state of Missouri,

(3) Bonds of any city in this state hav-  
ing a population of not less than two  
thousand,

The Honorable M. E. Morris

- (4) Bonds of any county in this state,
- (5) Approved registered bonds of any school district situated in this state,
- (6) Approved registered bonds of any special road district in this state,
- (7) State bonds of any state,
- (8) Bonds of any Federal Land Bank,
- (9) Bonds of any Federal Intermediate Credit Bank,
- (10) Bonds of the Federal Farm Mortgage Corporation,
- (11) Bonds of the Federal Home Loan Banks,
- (12) Any bonds or other obligations guaranteed as to payment of principal and interest by the government of the United States, to an amount equal at least to one hundred and ten per cent of the aggregate amount on time deposit as well as on demand deposit with the particular banking institution, less the amount, if any, which is an insured deposit pursuant to the Federal Deposit Insurance Act of 1950 (64 Stat. 873) as heretofore or hereafter amended."

It is to be noted that the bonds or other obligations of sewer districts are not specifically included therein, and that by the primary rule of statutory construction, *expressio unius est exclusio alterius* -- the enumeration of particular things excludes the idea of something not included. We are of the opinion that bonds of the Metropolitan Saint Louis Sewer District would not be eligible as security for State of Missouri funds deposited in banks.

Very truly yours,

---

NORMAN H. ANDERSON  
Attorney General

May 10, 1965



Honorable Bill Crigler  
State Representative  
Howard County  
Capitol Building - Room 406  
Jefferson City, Missouri

Dear Mr. Crigler:

You have asked a number of questions which we will attempt to answer as follows:

1. Question: "State Tax Commission held County Assessors must value Real Estate sold at 30% of selling price. On property sales where revenue stamps are affixed this is easy done but revenue stamps are not affixed in every case. What does Assessor do where revenue stamps are not affixed?"

Answer: Attached hereto is copy of Attorney General's Opinion dated February 28, 1957, to Arthur B. Cohn, also copy of Opinion No. 233 dated July 17, 1964, to William H. Bruce, Jr.

2. Question: "County Clerk is paid under Section 50.800 paragraph 2 for making Financial Statement, up to thirty cents for every hundred words and figures. What is a figure? Is \$125,454.00 one figure or eight?"

Answer: We are advised that the policy of the State Auditor is to count each digit in determining the rate of pay.



Honorable Bill Crigler

3. Question: "Section 205.200, Special Tax Levy for County Hospital Maintenance. Does County Court have to set tax rate at amount certified by board of trustees or does County Court have power to use their own judgment?"

Answer: Attached hereto find copy of Attorney General's Opinion dated April 14, 1953, to Leon McNally, also find copy of Opinion No. 44 dated April 19, 1965, to Lewis B. Hoff.

4. Question: "County Hospital Board of Trustees have purchased Bonds with excess money. Who should keep receipts for those bonds for safekeeping?"

Answer: The County Hospital Board is without power to purchase bonds. See attached Opinion dated June 27, 1950, to Wilson D. Hill.

5. Question: "Section 205.200. Can funds arising from maintenance tax levy be transferred to construction fund and be used to pay for construction of Hospital?"

Answer: See Attorney General's Opinion No. 44 dated April 19, 1965, to Lewis B. Hoff, attached.

6. Question: "Section 205.200. Can funds arising from maintenance tax levy be used in building a new wing to said Hospital?"

Answer: Also see Opinion No. 44 dated April 19, 1965, to Lewis B. Hoff.

7. Question: "Section 205.190 RS Mo 1963 paragraph 4, the Hospital Board may once each month present to the County Court a single voucher etc.. Should the Hospital Board present to County Court an itemized list of how money is to be disbursed? For example, Joe Blow, Salary, 715.00, Jane Blow, salary, 415.00, Smith Hospital Supply Co., Bandages, 810.00?"

Answer: Herewith attached is Opinion No. 240 dated September 3, 1963, to Clyde E. Rogers which answers this inquiry.

Honorable Bill Crigler

8. Question: "Section 205.190 RS Mo 1963 provides for Bonding of Superintendent of Hospital. Where is Bond filed?"

Answer: With the Secretary of the Board or where other papers of the Board are kept.

9. Question: "Funds arising from Special Road and Bridge Tax, 35 cents on the \$100 assessed valuation is divided, 80% to Special Road District and 20% to County. Can County Court make a special grant to Special Road Districts once each year out of their 20% of such tax? We have four Special Road Districts, Can we give them each check for \$1000.00?"

Answer: Attached hereto is copy of Attorney General's Opinion dated March 1, 1948 to Walter Whinrey, which I believe answers this inquiry.

10. Question: "County Hospital was built by Bonding the County. Bond Tax rate set at 16 cents per \$100 assessed valuation. That fund now has an excess of money. Can County Court invest the excess in Government securit(i)es? Would you advise investing the excess or would you advise lowering the tax rate?"

Answer: Attached hereto is copy of Attorney General's Opinion No. 177 dated December 20, 1963, to Robert B. Mackey, which I believe answers this question.

11. Question: "The first six months of year the County has excess money in County Revenue fund. Can County Court invest the excess in short term U. S. Government securities?"

Answer: See attached Opinion No. 177 dated December 20, 1963, to Robert B. Mackey.

Honorable Bill Crigler

12. Question: "Our Howard County Hospital has been in operation since January 1, 1963. I as Howard County Treasurer, have not been invited to attend a board meeting. In RS Mo 1959 Sec 205.190 item 2- should I receive this single voucher mentioned in the preceding item 8 of this paper as treasurer of the Board of Trustees and pay out bills as authorized by the board?"

Answer: Also see copy of attached Opinion No. 240 dated September 3, 1963, to Clyde E. Rogers, referred to above.

13. Question: "There was an opinion concerning County Traesurers office hours handed down in Cooper County a few years ago. May I have a copy of this opinion?"

Answer: Attached hereto is copy of Attorney General's Opinion dated September 23, 1959, to Phil Hauck, which I believe is the opinion to which you refer.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosures

February 25, 1965



Honorable William D. Kimme  
Prosecuting Attorney of Franklin County  
Union, Missouri

Dear Sir:

In your letter of February 13, 1965, addressed to this office you request an opinion or a recommendation on the following:

"Can a probate Judge disqualify himself if he feels prejudiced against any one party in any matter before him or in which he might have an interest? This, of course, is the case where no objections have been made and no jury has been asked for in the matter."

Section 472.060 RSMo 1959, paraphrased, states that no judge of probate shall sit in a case in which he is interested or in which he is biased or prejudiced against any of the interested parties. It further provides that if an objection is made, verified by affidavit, the cause shall be certified to the Circuit Court.

You state that no objection has been made.

If a judge feels that he is biased or prejudiced, in our opinion it is not only his prerogative, but his duty to state such a fact in the certificate and to certify the case to the Circuit Court.

The case of Phillips vs. Blossing 127 S.W. 2d 62, 63, is an point on this question.

Here the probate judge certified a cause to the Circuit Court and stated no reason for his having done so. The Court held as follows:

"It will be noted the proceeding was certified to the circuit court upon the motion of the probate judge; that there is nothing

in the order showing that the probate judge was disqualified to determine the cause, nor showing that any objection or suggestion was made that he was disqualified, nor does the order recite that either party in interest consented to the certification.

"[1] The probate court lacked power to certify the cause unless there was a substantial compliance with the provisions of section 2053, R.S. 1929, Mo. St. Ann. § 2053, p. 2646.

"[2] The probate court having no jurisdiction to certify the cause to the circuit court, the latter court acquired no jurisdiction. *Morris v. Lane*, 44 Mo. App. 1; *In re Estate of Albert*, 80 Mo. App. 557. If the order disclosed that the probate judge was in fact disqualified, and that the parties in interest requested or consented to the transfer, although no formal affidavit was filed as provided in section 2053, *supra*, a different question would be presented."

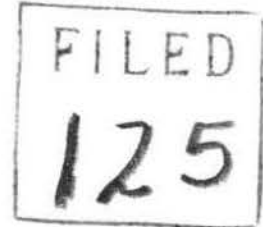
Our Supreme Court has held in a criminal case, *State vs. Selle* 367 S.W. 2d 522, that it is not only proper for a judge to disqualify himself in a matter in which he is interested, but it is his duty, the Court stating that a trial judge should retire whenever prejudice is suggested, either by affidavit, or by his own conscience.

In view of the statute and decisions of this state, we are of the opinion that a probate judge may disqualify himself and certify the case to the Circuit Court, but the certificate should contain the reason or reasons for his disqualification.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

1965



Mr. V. H. Simon, Chairman  
Wilson's Creek Battlefield  
National Park Commission  
The Southern Missouri Trust Company  
Springfield, Missouri

Dear Mr. Simon:

This is in response to your opinion request, dated April 5, 1965. Your request stated that certain lands acquired by the Wilson's Creek Battlefield National Park Commission for the creation of a National Park had taxes assessed against it for the years 1962, 1963 and 1964. You further state:

"It is necessary that the Commission furnish the United States a merchantable title to the lands so acquired for said Park, free of liens and encumbrances, and consequently we will appreciate being advised as to whether or not the aforesaid State and County taxes are now a lien against the lands upon which they are assessed, the title to said lands being vested at this time in the State of Missouri."

Enclosed you will find an opinion, answered by letter issued by this office September 5, 1947, to the Honorable Roy A. Jones. The enclosed opinion cites the authorities upon which this office relied in that holding. We believe that the 1947 opinion still accurately states the law on this matter.

On pages 3 and 4 of the enclosed opinion, the case of State vs. Baumann, banc, 348 Mo. 1964, 153 S. W. 2d 31, is discussed. The Baumann case is still controlling law in this area and has been cited with approval as recently as January, 1964 by the Missouri Supreme Court, en banc, in State vs. City of Springfield, Missouri, 375 S. W. 2d 84.

State vs. City of Springfield, supra, deals in part with the liability of a political subdivision for assessed taxes upon



property acquired for public purposes. Therein the Court holds that the City of Springfield was not subject to tax collection measures because the property was exempt from taxation. The Court further stated (l.c. 91):

"This principle is aptly and more fully expounded in the oft-cited case of *Gachet v. New Orleans*, 52 La. Ann. 813, 27 So. 348: 'The tax law of a state,' says Desty in his work on Taxation (volume 1, p. 48), 'applies to persons only, and not at all to political bodies like municipal corporations, which exercise in different degrees the sovereignty of the state.' Hence it is that when property upon which state taxes are assessed is acquired by a political subdivision of the state, like the city of New Orleans, to which certain powers of sovereignty and government, have been delegated by the state, which property is acquired for purposes of public utility coming within the scope of the powers so delegated, and is immediately dedicated or applied to such purposes of public utility, the taxes so assessed in favor of the state upon the same cease to be exigible. It pertains to the public policy of the state not to exact taxation on property so held and used. Within the scope of the powers delegated to it, the city stands for the state, and property acquired by the city in the due execution of its mandate from the state stands in consimili casu with property owned by the state itself, and taxes assessed in favor of the state upon such property must be held abated."

The Wilson's Creek Battlefield National Park Commission is without question a governmental agency entitled to the immunity from taxation, as set out above. The Commission was created by Senate Bill 254, enacted in 1961. Laws, 1961, page 237. This act has not been made a part of the Revised Statutes, but may be found in the Session Laws, as cited. Further, the appropriations for the Commission were approved, as submitted, in Section 2, House Bill No. 14. Laws, 1963, page 65.

It is the opinion of this office, based upon the authority of *State vs. Baumann*, supra, and *State vs. City of Springfield*, supra, that taxes assessed against land acquired and used for public purposes are uncollectable and that this immunity bars

Mr. V. H. Simon

-3-

delinquent taxes assessed prior to such acquisition.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure

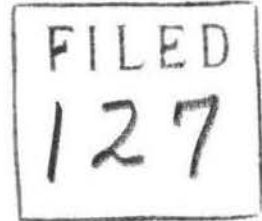
cc: Mr. John Vaughn, Director  
Division of Budget and Comptroller

WAP:mac

INSURANCE:  
APPROVAL OF BOND FOR  
SUPERINTENDENT:

Opinion No. 127

March 8, 1965



Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

Reference is made to your letter of February 15, 1965, with which you enclosed the official bond of the superintendent of insurance. You have requested the approval of the bond by this office pursuant to Section 374.030 RSMo 1959.

It is the policy of this office to withhold its approval of official bonds unless the bond has been carefully executed in strict compliance with the applicable statutes. Section 374.030 RSMo 1959 provides that the bond of the superintendent of insurance shall be " \* \* \* conditioned for the faithful discharge of his duty, \* - \* ". The bond which you have submitted for the approval of this office is conditioned as follows: "Faithfully perform the duties of his office as provided by law." Although this condition does not follow the literal language of the statute, it is our opinion that the condition sufficiently meets the requirement of the statute.

The date of appointment to the office of superintendent of insurance is not reflected on the bond. The oath of office was taken before a notary public commissioned to execute oaths in Cole County, Missouri. However, the oath does not indicate that it was executed in Cole County, the space to be filled in for the proper county being left blank.

Upon examination, I find that the bond complies with the provisions of Section 374.030 RSMo 1959, when viewed together with Section 107.080 RSMo 1959, and I hereby register my approval as required by law, conditioned, however, upon the completion of the bond form to reflect the date of appointment to the office of superintendent of insurance and to reflect

Honorable Robert D. Scharz

-2-

that the oath of office was executed in Cole County, Missouri.  
The bond is returned herewith.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:aa

Encl.

SCHOOLS:  
COUNTY SUPERINTENDENTS:  
TEACHERS:  
OFFICERS:  
INCOMPATIBLE OFFICES:

1. A county superintendent who becomes a lawfully qualified public school teacher vacates his office regardless of the brevity of service as a teacher;

2. A county superintendent who acted as a public school teacher without executing a written contract as required by Sections 163.080 and 432.070, RSMo 1959, did not have a lawful right to the position of teacher. Since legally she

never held the position of teacher, there was no dual capacity and the doctrine prohibiting holding of incompatible public positions does not operate to vacate the county superintendent's office.

OPINION NO. 129

August 19, 1965

Honorable John K. Leopard  
Prosecuting Attorney  
Daviness County  
Gallatin, Missouri 64640



Dear Sir:

This official opinion is issued in response to your request. You request clarification of our Opinion No. 350 issued December 30, 1964, to Marvin Dinger, so far as it may apply to your county superintendent.

You inform: Your county superintendent taught in the local junior high school for a period of 52 days pending a regular teacher becoming qualified to teach. The county superintendent did not enter into a signed, written contract to teach.

In Opinion No. 350 this office ruled that the capacities of county superintendent of schools and public school teacher are incompatible and a county superintendent who accepts employment as a public school teacher automatically vacates his office.

In your letter you suggest that our opinion should not apply to your situation because the teaching here was only on a temporary substitute basis and also that the common law incompatibility rule only applies between two public offices and not merely public employments.

Whether a public officer holds another incompatible position permanently or merely temporarily is generally not a basis for an exception to the incompatibility rule. There is authority holding that where an officer is wrongfully expelled or kept from entering his office, accepting a second office during the contest over the first does not vacate the first office. *Gracey v. St. Louis, Mo.*, 111 S.W. 1159. However, this is not the case here. You do not inform us that the county superintendent acted anyway but voluntarily in entering her second position. The authorities uniformly hold that if the

Honorable John K. Leopard

positions are incompatible, the length of time spent in the second position is not material. This question is annotated at 100 A.L.R. 1081.

As to your suggestion that the doctrine of incompatibility only applies to public offices and not to mere public employments:

We note that public school teachers have been held to be public officers in some cases. Other cases have held them to be public employees but not officers. 30 A.L.R. 1423; 75 A.L.R. 1352; 110 A.L.R. 800; 47 Am.Jr., Schools, § 108. The greater weight of authority holds them not to be officers. You will note that Opinion No. 350 is not premised on the proposition that a public school teacher is a public officer.

You suggest that the common law rule of incompatibility applies only to public offices. There is authority on both sides of this question. Cf. 42 Am.Jur., Public Officers, § 61; 67 C.J.S., Officers, § 23, p. 150.

In Opinion No. 350 we relied upon the case of Knuckles v. Board of Education of Belle County, Ky., 114 S.W.2d 511, 515. Knuckles was an assistant county superintendent who accepted employment as a public school teacher. The court in Knuckles did not consider a teacher to be a public officer.

" . . . Furthermore, the same opinions, as well as the texts, apply the consequences of incompatibility (either at common law or under the Constitution or statutes) not only as between public positions expressly designated as an 'office,' but such incompatibility is also applied, with the same consequences, as between what might be termed public employees when the functions to be performed by the incumbent partakes of the nature of the duties and functions of an officer, although the incumbent might be designated as only an 'employee,' or he may be so regarded by necessary inference."

The incompatibility rule is a doctrine of public policy. It is designed to prevent the concentration of governmental power in a single individual and further to prevent public officers from having conflicting interests in performing their duties. We have pointed out in Opinion No. 350 examples of conflicts which might arise if a county superintendent were simultaneously a teacher, principal or superintendent of instruction of a public school within his jurisdiction.

Therefore, we are of the opinion that a county superintendent who lawfully enters into employment as a public school teacher vacates



Honorable John K. Leopard

his office regardless of the length of term as a teacher.

We do not think, however, that your county superintendent has vacated her office under the facts you present us. This, for the reason that apparently she never lawfully qualified as a public school teacher. Of course, if an officer does not in fact enter another incompatible position, there is no dual capacity and no vacating of the office. You inform us that your county superintendent did not enter into a written, signed contract to teach. If this be the fact, then she never legally became a public school teacher.

School boards have only such powers as are conferred expressly or by necessary implication of statutes. School boards have no authority to employ teachers except under the provision of Section 163.080, RSMo 1959. This statute clearly contemplates a written, signed contract. Also Section 432.070, RSMo 1959, provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

In Massie v. Cottonwood School District No. 36 of Nodaway Co., MoApp., 70 S.W.2d 1108, a teacher attempted to recover on the basis of an oral contract. The court held, citing the above statutes, that the contract must be in writing.

In a comparable case the Supreme Court affirmed a judgment recovering payments made to an individual under a contract with a city which was not validly executed as required by Section 432.070. Fulton v. City of Lockwood, Mo., 269 S.W.2d 1.

The board had no authority to employ a teacher without a written contract. No written contract was executed. Thus, the county superintendent did not have legal right to the position of public school teacher. Since, in legal contemplation, the county superintendent did not hold the position of school teacher, there was no dual capacity and accordingly the doctrine of incompatibility does not come into play.

Honorable John K. Leopard

### CONCLUSION


Therefore, it is the opinion of this office that:

1. A county superintendent who becomes a lawfully qualified public school teacher vacates his office regardless of the brevity of service as a teacher;

2. A county superintendent who acted as a public school teacher without executing a written contract as required by Sections 163.080 and 432.070, RSMo 1959, did not have a lawful right to the position of teacher. Since legally she never held the position of teacher, there was no dual capacity and the doctrine prohibiting holding of incompatible public positions does not operate to vacate the county superintendent's office.

The foregoing opinion, which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

March 5, 1965

FILED

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Honorable Charles B. Faulkner  
Prosecuting Attorney of Lawrence County  
Mt. Vernon, Missouri

Dear Mr. Faulkner:

This letter is in answer to your request for an opinion of this office on the question of whether an elected Councilman of a third class city can also be employed on a monthly salary either as an employee of the City's Street Department or as the Street Commissioner of the City.

The Street Commissioner is appointed by the Mayor with the consent and approval of a majority of the Council, pursuant to Section 77.330, RSMo 1959. You have stated that employees of the Street Department are appointed subject to the approval of the Mayor and Council. It is our view that a Councilman is ineligible for either employment on the ground of public policy of the State of Missouri.

A leading authority which bears on this question is that of State ex rel. vs. Bowman 184 Mo. App. 549.170 S.W. 700. In that case a city Councilman was held ineligible for the appointive office of City Clerk. The Court stated, l.c. 703:

"We are not without abundant authority for this ruling. The case of Meglemery v. Weissinger, 140 Ky. 353, 131 S. W. 40, 31 L.R.A. (N.S.) 575, is a leading case on this subject. The editorial note to that case says:

"The adjudged cases upon the validity of appointment to office made from the membership of the appointing body hold uniformly that such appointments are illegal and to be generally discounted."

"In that case it was held that the fiscal court of a county, empowered to appoint a bridge commissioner, a salaried officer could not appoint one of their own number. No specific statute or constitutional provision is cited as prohibiting such action. The court held the appointment void as against public policy, and said:

"Nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule. The fact that the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his associations and relations afford to place the other members under obligations that they may feel obliged to repay."

"Other cases to the same effect will be found, giving the same and other

reasons for so holding. Smith  
v. City of Albany, 61 N.Y. 444;  
Gaw et al. v. Ashley et al., 195  
Mass. 173, 80 N.E. 790, 122 Am St.  
Rep. 229; People v. Thomas, 33  
Barb. (N.Y.) 287; State ex rel.  
v. Taylor, 12 Ohio St. 130; Kinyon  
v. Duchene, 21 Mich. 498."

Consequently we feel that your inquiry must be answered in  
the negative.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj

Opinion No. 131  
Answered by letter  
(Nowotny)

May 27, 1965



Honorable Patricia L. Webber  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

Dear Ms. Webber:

This is in reply to your request for an opinion of this office reading as follows:

"In 1959 a \$25,000.00 road bond issue was passed in Grand River Township. The last payment on this issue will be due in March, 1971.

"The 1964 levies in Grand River Township excluding school and library levies were as follows:

"STATE	LIVINGSTON COUNTY	TOWNSHIP RATE	ROAD & BRIDGE	ROAD BOND
.07	.40	.10	{Twp. 30 County .05}	.30
			.35	

"The Livingston County Court has asked this office the following question: 'May a general road district be formed in Grand River Township and an election held for the purpose of voting on additional road taxes not to exceed thirty-five cents on each one hundred dollars assessed valuation under article X, section 12A of the Missouri Constitution, when a road and bridge levy and a road bond levy already exist in the township?'"

Article X, Section 11(b), of the Missouri Constitution, prescribes limitations on tax rates for municipalities, counties and school districts.

Article X, Section 11(e), says that:



"The foregoing limitations on rates shall not apply to taxes levied for the purpose of paying any bonded debt."

Article X, Section 12(a), then says that:

"In addition to the rates authorized in section 11 for county purposes, . . . the township board of directors in the counties under township organization, . . ., may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

Your letter discloses that the township in question already has a thirty-five cent additional road and bridge levy as permitted by the first sentence of Article X, Section 12(a), and Section 137.585, RSMo 1959. The township also has a road bond levy. Your question seems to be whether the tax levy allowed by the second sentence of Section 12(a) is already fulfilled by this bond levy.

It is our opinion that such a bond levy does not arise from the provisions of Section 12(a) since the Section 11(b) limitations on rates do not apply to taxes for bonds and Section 12(a) rates are in addition to Section 11 rates. Road bonds are provided for by Section 233.450, RSMo 1959, and taxes for these bonds by Section 108.280, RSMo 1959. Thus, under the second sentence of Article X, Section 12(a), another levy not to exceed thirty-five cents would be allowable as a road district levy.

As to forming a general road district and holding an election, we refer you to Sections 231.160 and 137.565, RSMo 1959, and the enclosed opinions of this office to Honorable R. Kip Briney, dated

Honorable Patricia L. Webber

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May 1, 1945, Honorable Herbert S. Brown, dated February 4, 1947,  
Honorable C. E. Ernst, dated July 25, 1947 and Honorable Wayne  
Norman, dated December 8, 1947.

Very truly yours,

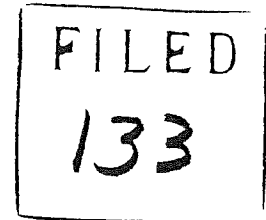
NORMAN H. ANDERSON  
Attorney General

SCHOOL DISTRICTS: A teacher in the public school system  
SCHOOL TEACHERS: of Missouri, who was eligible for state  
RETIREMENT AGE: teacher retirement benefits under the  
SOCIAL SECURITY: Public School Retirement system of Missouri,  
upon reaching age 70, is also covered by  
Federal Social Security after reaching age  
70 when and if he occupies a position dif-  
ferent from any position he occupied prior  
to age 70 which was covered by such state  
teacher-retirement system.

OPINION NO. 133

August 4, 1965

Honorable John C. Vaughn  
Comptroller and Budget Director  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Vaughn:

You have requested an official opinion of this office.  
Your inquiry states:

"Are the positions of school teachers  
over age 70 covered under the Social  
Security Agreement as ineligibles?  
If so, is there any distinction be-  
tween those who continue to occupy  
the position beyond age 70, and those  
who are over age 70 when they first  
occupy the position?"

This opinion involves those teachers, who, prior to  
age 70 were members of the State Retirement System under  
Sections 169.010 to 169.130 RSMo, as amended, and does not  
include those groups of teachers in the public schools that  
have elected coverage under Federal Social Security.

Section 169.060 RSMo 1963 Supp., provides that any  
member in service shall be retired automatically on the  
first day of July next following the school year in which  
he reaches the age of 70 years.

The "Social Security Agreement" referred to in your inquiry was executed July 13, 1951, by the regional director of the Federal Security Administration on behalf of the United States and by the Governor and Comptroller on behalf of the State of Missouri. This agreement, taken in connection with subsequent modifications, extends the insurance system of the Federal Social Security Act to certain employees of the state, its sub-divisions, and instrumentalities. Modification No. 64, executed January 30, 1956, I (C) (1) (b) (iii), extends Social Security coverage to "Service performed by an individual . . . in a position covered by a [state] retirement system, if the individual performing such service was ineligible to become a member of such [state] retirement system on the date the agreement was made applicable to such coverage group (or, if later, the date on which such individual first occupied such position)." Individuals are not covered by Federal Social Security as long as they are eligible under the Public School Retirement System of Missouri.

A teacher (as defined in Section 169.010 RSMo; this includes employees who are not instructors) becomes ineligible under a state retirement system upon retirement at age 70 pursuant to Section 169.060, supra. He would thus be covered pursuant to I (C) (1) (b) (iii) of the Agreement which provides, "if the individual . . . was ineligible to become a member of such retirement system on the date the agreement was made applicable . . . or, if later, the date on which such individual first occupied such position." (Emphasis ours).

Thus, a teacher, formerly under the Public School Retirement System of Missouri, would be covered by Federal Social Security if he was ineligible to become a member of the Public School Retirement System of Missouri, on the date on which he first occupied his present position, otherwise he would not be covered by Social Security. Therefore, if he has the same position which he held before retirement age, he would not be covered by Social Security if, while in that position he had been covered by the Public School Retirement System of Missouri.

Teachers eligible for state retirement benefits upon reaching age 70, under the Public School Retirement System

of Missouri, may become eligible for Federal Social Security coverage by assuming, after reaching age 70, a position in the public schools different from any position previously held that was covered by such state retirement. Unless such change in employment occurs, a teacher past 70 cannot acquire coverage under Social Security.


This opinion is not intended to approve the illegal employment of teachers beyond retirement age. This office has previously ruled that a school board cannot legally employ a teacher who is retired by the provisions of Section 169.060 RSMo 1959, except as a temporary substitute under Section 169.560, (Opinion 217, Cohn, July 25, 1962). The present opinion in no way changes our ruling in such Opinion No. 217. However, the United States Department of HEW by its Assistant General Counsel has ruled that if a person is an employee in fact, although his employment is illegal under state laws, such person is considered an employee for social security purposes. Therefore, this opinion is limited to employment for social security purposes.

#### CONCLUSION

It is the opinion of this department that a teacher in the public school system of Missouri, who was eligible for state retirement benefits under the Public School Retirement System of Missouri, upon reaching age 70, is also covered by Federal Social Security after reaching age 70, when and only when he occupies a position different from any position he occupied prior to age 70 which was covered by such state teacher-retirement system.

The foregoing opinion which I hereby approve was prepared by my assistant, Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

MOTOR VEHICLES:  
LOCAL COMMERCIAL  
MOTOR VEHICLES:  
COMMERCIAL MOTOR  
VEHICLES:

(1) An owner of a vehicle registered as a non-farm local commercial motor vehicle is in violation of Section 301.010 (10), RSMo, if it is found at a point beyond the twenty-five miles from the municipality of operation but within twenty-five miles from the municipality of registration; (2) There is no requirement in Section 301.020, RSMo, that in registering a local commercial vehicle, the owner designate the municipality from which to compute the twenty-five mile radius, and; (3) There is no requirement in the statutes that the municipality designated on the side of the vehicle in compliance with Section 301.330, RSMo, be the same as the municipality from which the vehicle is registered.

OPINION NO. 136

May 10, 1965



Mr. Hugh H. Waggoner  
Superintendent  
Missouri State Highway Patrol  
Jefferson City, Missouri

Dear Mr. Waggoner:

Your recent request for an opinion of this office raised several questions concerning local commercial vehicles.

You first asked for the answer to a hypothetical fact situation which you posed as follows:

"To illustrate the point in question, John Doe, who resides in Jefferson City, Missouri, owns a commercial motor vehicle. In complying with Section 301.330 he shows on the doors of his vehicle with appropriate lettering 'John Doe, Jefferson City, Missouri, Gross Weight 54,000 pounds, Local.' He then is observed with his truck at Vienna, Missouri, which is considerably beyond the twenty-five (25) mile radius of Jefferson City, Missouri. He does not contend that he is operating the truck in connection with any farm. He produces a registration receipt on the vehicle, and it shows an address of Westphalia, Missouri. Vienna is within twenty-five (25) miles of Westphalia.



"Mr. Doe contends he has complied with the provisions of Section 301.330 pertaining to markings since he has shown his name, the address from which the vehicle is operated (Jefferson City), the gross weight for which licensed, and has shown the word 'Local.' He further contends that he is not in violation on his local license as he is operating the vehicle with a twenty-five (25) mile radius of a municipality, Westphalia."

We understand that you want to know first, if John Doe has violated the law pertaining to local commercial vehicles by being outside the twenty-five mile radius of the municipality designated on the side of the truck, while within the twenty-five mile radius of the municipality from which the truck was registered.

Secondly, if, in registering a commercial motor vehicle with a local license, the owner must designate the municipality from which to compute the twenty-five mile radius? And if so, thirdly, must the municipality so designated be the same municipality as that shown on the side of the vehicle in compliance with Section 301.330, RSMo?

The answer to your second question, hence your third question also, is in the negative. We find no statute which would require a person obtaining a local commercial vehicle license to designate the municipality from which to compute the twenty-five mile area, therefore, there can be no requirement that the name of the municipality on the side of the truck be identical with the municipality of registration.

Section 301.010, RSMo, defines a non-farm local commercial motor vehicle as:

"(10) . . . a commercial motor vehicle whose operations are confined to a municipality and that area extending not more than twenty-five miles therefrom . . ."

Section 301.330, RSMo, provides:

"All commercial motor vehicles shall display in a conspicuous place on both sides thereof:

- (1) The name of the owner;
- (2) The address from which such motor vehicle is operated;
- (3) The gross weight for which said vehicle is licensed;

(4) Local commercial vehicles in addition shall display in a conspicuous place the word 'local'."

It is to be noted that these two statutes refer to the place of operating the commercial vehicle and not the place of registration or the business address of the owner. It is possible that the owner's business address and the place where one of his commercial vehicles operates from may be in different municipalities. Thus, Section 301.020, RSMo., providing for registration of motor vehicles, which requires:

"(2) The name, residence and business address of the owner of such motor vehicle;"

does not require the owner to designate the place of operation of such vehicle. It is only coincidental that in many situations the business address of the owner is the same as the place of operation of the vehicle.

In answer to your first question, as to whether John Doe is in violation of Sections 301.010 to 301.440, RSMo, when he is found operating his vehicle at a point outside the twenty-five mile radius of the municipality designated on the side of the vehicle, it is the opinion of this office that such is a violation.

Section 301.010 (10), RSMo, clearly limits the operation of a local commercial vehicle solely within the area extending twenty-five miles from one municipality. The language used in the statute is "... a municipality." This language was changed by amendment in 1951 from "any municipality." Thus the legislature clearly expressed its intent that a person holding a local commercial vehicle license may operate only near one municipality. That he would not be in compliance with the law if he were outside the twenty-five mile area around that municipality, but within the twenty-five mile area of some other municipality. See enclosed opinion to Honorable D. W. Sherman, Jr., dated February 20, 1953. Such operation of the vehicle would remove it from the classification of local and require a person who wished to operate his vehicle in such manner to purchase the more expensive "beyond local" license plates.

The owner of a local commercial vehicle is required by Section 301.330, supra, to display on both sides of the vehicle, "the address from which such motor vehicle is operated" and the word "local." This statute does not require the "business address" of the owner as does the registration statute, Section 301.020, supra, but rather the address from which the vehicle is operated. A non-farm local commercial vehicle may be operated only in one municipality and within a twenty-five mile area therefrom. Therefore, the owner of such non-farm local commercial vehicle is required by law to designate on the

Mr. Hugh H. Waggoner

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side of the vehicle, the municipality from which to compute the twenty-five mile area.

If such owner designates a municipality other than the one from which he operates the vehicle, he is in violation of the statute. If such vehicle is found at a point in excess of twenty-five miles from the municipality designated on the side of the vehicle, he is in violation of Section 301.010 (10), supra. It is no defense that the vehicle was registered at a municipality less than twenty-five miles from where he was found, but more than twenty-five miles from the municipality of operation. It is the place of operation that determines whether the law has been violated, not the place of registration.

#### CONCLUSION

Therefore, it is the opinion of this office that: (1) An owner of a vehicle registered as a non-farm local commercial motor vehicle is in violation of Section 301.010 (10), RSMo, if it is found at a point beyond the twenty-five miles from the municipality of operation but within twenty-five miles from the municipality of registration; (2) There is no requirement in Section 301.020, RSMo, that in registering a local commercial vehicle, the owner designate the municipality from which to compute the twenty-five mile radius, and; (3) There is no requirement in the statutes that the municipality designated on the side of the vehicle in compliance with Section 301.330, RSMo, be the same as the municipality from which the vehicle is registered.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jeremiah D. Finnegan.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure

/April 19, 1965



Honorable Paul M. Berra  
State Senator, 3rd District  
Capitol Building - Room 429  
Jefferson City, Missouri

Dear Senator Berra:

You recently requested the views of this office as to Senate Bill No. 71, 73rd General Assembly, which would establish and regulate maximum hours of duty for paid firefighters in fire departments of cities, villages and fire districts having a population of ten thousand inhabitants or more.

The bill in brief provides as follows:

Section 1 of the Bill provides that except for certain enumerated exceptions found in Sections 2 and 3, no employees of any city, town, village or fire district fire departments having in excess of ten thousand population shall work longer than the hours set out in Section 2.

Section 2 establishes and regulates the hours to be worked and when they are to be worked. It further excepts some employees of fire departments that do not actually fight fires and provides that the hours of such employees shall not be in excess of the hours worked by the majority of other city employees.

Section 3 excepts from the provisions of Sections 1 and 2, the chief, volunteers and the members required to remain on duty during emergencies.

Section 4 provides that no employee shall lose wages or benefits due to this act or due to the decrease of hours worked.

You ask if this bill is questionable in any way. We understand from conversations with you that opponents of this bill have questioned the bill's constitutionality on three grounds and you are asking if this bill's constitutionality is indeed questionable on these grounds.

One ground challenges the general legislative power to enact any legislation regarding the hours of service of firemen.

The argument is that a city's fire department is purely a local matter, separate and apart from the interests of the people of the state at large.

There are no Missouri cases on this point, however, courts in other jurisdictions have found that the legislature may not validly enact such legislation regulating hours of firemen. See cases cited at 16 McQuillin, Municipal Corporations, §45.03.

On the other hand, courts have found this within the power of the legislature and this appears to be the general rule. This rule is stated at 62 C.J.S. Municipal Corporations, §600, p. 1235, as follows:

"The state . . . may regulate the hours of service of its firemen. Provisions for the establishment of shifts or a platoon system for firemen have generally been upheld as valid . . . . In the absence of constitutional restrictions, the state legislature may enact laws relative to the hours of service of firemen without infringing on a municipality's right of home rule and local self government."

We may only speculate as to which rule the Missouri courts would follow. The state has a public interest in the fighting of fires within the state. Fires do not follow municipal boundary lines. They may begin within the bounds and spread outside or vice versa. It is not purely a local function. Thus, it is our view that the legislature probably has the general power to enact a bill regulating fire departments and hours of employment of firemen under its police power.

Opponents of the bill contend that even if the legislature has the general power to enact such legislation, Senate Bill 71 is limited in its application only to cities other than constitutional charter cities, because of Article VI, §22, Constitution of Missouri, 1945. This Article prohibits the legislature from creating or fixing the powers, duties or compensation of employees of constitutional charter cities. The Article provides as follows:



"No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter \* \* \*" (Emphasis added.)

It is possible that the courts of Missouri may determine that Senate Bill 71 fixes or creates the powers, duties or compensation of firemen of constitutional charter cities.

It is difficult to reasonably construe this bill to fix or create powers of firemen. The constitutionality of this bill, if enacted into law, may be challenged and it is possible that the courts may find it to be creating or fixing duties or compensation of firemen.

Section 4 of the bill, which provides that no fireman "shall suffer any reduction in annual pay, sick leave time, vacation pay or time, or any other benefits being received" because of this act or a decrease in hours worked as provided in this act, could possibly be construed by the court as violating Article IV, §22 of the constitution. It is possible that this could be construed by the courts to be fixing the duties or compensation of employees of constitutional charter cities.

The Missouri Supreme Court En Banc in City of Joplin v. Industrial Commission of Missouri, 329 S.W.2d 687, by way of dictum held that if the Prevailing Wage Act (Section 290.210-290.310) were applied to employees of constitutional charter cities it would be unconstitutional as to such cities as fixing compensation prohibited by Article VI, §22. The court said, l.c. 692:

"\* \* \*It is also a familiar rule of construction that when one construction of a statute will make it unconstitutional and another construction will make it constitutional, the latter will be made if it is reasonable. State ex inf. McKittrick v. American Colony Ins. Co., 336 Mo. 406, 80 S.W.2d 876, 883, and cases cited. To construe the Act as applicable to direct employees of public bodies would make it unconstitutional as to all cities adopting their own charters under the provisions of Sec. 19, Art. VI, of the Constitution because Sec. 22 of Art. VI provides: 'No law shall be enacted creating or fixing \* \* \* compensation of any municipal office or employment, for any city framing or adopting its own charter \* \* \*. Furthermore, the legislative history of the Act indicates an intent to limit its application to employees of contractors constructing public works on contracts with public bodies. This seems clear from a consideration of the language originally used in House Bill 294 that was left out of the House Committee Substitute for House Bill 294, which was the



measure enacted by the 1957 General Assembly. We therefore, hold that the Act does not apply to employees of public bodies."

The courts of Missouri may find that the dictum of the Missouri Supreme Court En Banc in such case regarding the validity of the Prevailing Wage Law if applied to employees of constitutional charter cities may apply equally to a legislative attempt to fix minimum salaries or other conditions of employment for firemen of such cities.

Opponents of the bill also challenge the bill as a special law in violation of Article III, §40, which prohibits the legislature from passing local or special laws:

"(21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts; . . .

"(27) regulating labor, trade, mining or manufacturing; . . .

"(30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject."

Senate Bill 71 applies only to persons employed by fire departments of cities, towns, villages and fire districts with over ten thousand population. It excepts the person in charge of the fire department and volunteers from its provisions. It also treats those employees of the fire department who do not actually fight fires differently than the firefighters. Since it has these different classifications, it might be attacked as a special law in violation of Article III, §40.

A law is not a special law merely because it does not apply to everyone in the state. A law may be general if it relates to persons or things as a class rather than relating to particular persons or things. *State v. Ward*, 328 Mo. 658, 40 SW2d 1074; *Walters v. City of St. Louis*, 259 SW2d 377.

The classification must rest upon some reasonable basis and not upon a purely arbitrary division. *Reals v. Courson*, 349 Mo. 1193, 164 SW2d 306.

Therefore, it is our view that if the classifications in the bill are found by the courts to be based upon reason and are not purely arbitrary, the bill if passed would probably not be held by the Courts to be a special law. Probably any challenge of the law would be on the ground of unreasonableness of the classifications.

Honorable Paul M. Berra

-5-

We have attempted to inform you of the major grounds that the constitutionality of this bill would be questioned in the courts if finally passed. The bill may possibly also be challenged on other grounds which we cannot foresee at this time.

We cannot with assurance predict what course the courts would take if the bill is finally enacted. While the act if enacted may be attacked in the courts, a presumption of validity will attach to the enacted statute and the courts will uphold its validity unless it clearly contravenes some constitutional provisions. State v. Weindorg, Mo., 316 SW2d 806. In addition, if the courts should find one section of the law invalid the remainder of the act will not be invalid if it is complete in itself without the invalid portion. State ex rel. McDonald v. Lollis, 326 Mo. 644, 33 SW2d 98.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JDF:bf:aa

May 24, 1965



Honorable Warren E. Hearnes  
Governor  
State of Missouri  
Executive Office  
Jefferson City, Missouri

Dear Governor Hearnes:

This letter is being written pursuant to your request for advice concerning the appointment of non-residents of Missouri to the State Mental Health Commission.

In determining whether such Mental Health Commission members must be residents of the State of Missouri, we first look to the statutes dealing with such commission.

The statute authorizing appointment of members to the State Mental Health Commission and prescribing their powers and qualifications is Section 202.031, RSMo 1959. This section does not by its terms require residence in the State of Missouri.

However, Section 8 of Article VII of the Missouri Constitution of 1945 does contain a residency requirement for officers of this state. This section reads as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge." (Emphasis ours)

From the terms of this constitutional provision, it is seen that in order for the Governor to appoint non-resident members to the State Mental Health Commission, such person must either: (1) Not be "officers" in the sense of this constitutional provision, or (2) Such positions on the State Mental Health Commission must be "administrative positions requiring technical or specialized skill or knowledge" so as to fall within the exception of Section 8, Article VII of the Missouri Constitution of 1945.

It is our opinion that members of the State Mental Health Commission are "officers" within the sense of the provision of Section 8, Article VII. Criteria bearing upon the question of who is a public officer is discussed in the case of State ex rel. v. Bus, 135 Mo. 325, 331, 332 where the court said:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Offices, 1. The individual who is invested with the authority and is required to perform the duties is a public officer.

"The courts have undertaken to give definitions in many cases, and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer. \* \* \*."

In State inf. McKittrick v. Bode, 342 Mo. Rep. 162, 113 S.W. 2d 805, 806, 807, the Missouri Supreme Court discussed the question of who is a public officer under Section 10 of Article VIII of the Missouri Constitution of 1875, now Section 8 of Article VII under our present Constitution. The Court said:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted,

and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 C.J. p. 924. In determining that a deputy sheriff was a public officer, we stated the rule as follows:

"A public office is defined to be 'the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Meehem, Pub. Off., 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer.

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. \* \* \*".

Chapter 202 of the Revised Statutes 1959 relating to members of the State Mental Health Commission contains provisions which demonstrate that such members are officers under the above cited authorities. Section 202.031 provides in part:

"1. There is hereby created a 'State Mental Health Commission' composed of five members, to be appointed by the governor by and with the advice and consent of the senate, at least three of whom shall be physicians skilled in the treatment of nervous and mental diseases and none of whom may be otherwise employees of the state of Missouri.

\* \* \* \* \*



"6. (1) The commission shall advise the director of the division of mental diseases as to all phases of professional standards including patient care, training of personnel, establishment of treatment programs, obtaining adequate staffs, establishment of medical and statistical records and operation of practices in order that they may be compatible with professional requirements.

"(2) The commission shall advise the director in the approval and guidance of research projects and the distribution of research funds.

"(3) The commission shall assist the director in establishing and maintaining the best possible practices in all mental institutions."

The ultimate holding in the Bode case cited above where the court quoted from the Bus case, supra, is that a public officer is one who receives his authority from the state and discharges some of the functions of government in the performance of his official duties. We believe that members of the state mental health commission qualify under these authorities and thus are "officers" within the meaning of Section 8, Article VII, Constitution of Missouri 1945.

The next problem then is -- are such members of the commission "administrative positions requiring technical or specialized skill or knowledge" within the meaning of the exception clause of Section 8, Article VII, of the Constitution. The Supreme Court of Missouri has not apparently had occasion to define what is meant by "administrative positions" as used in this clause. Likewise, we have been unable to find cases that definitely define "administrative positions."

Bouvier's Law Dictionary, Third Revision being the Eighth Edition, Volume 1, page 138, defines "Administration of Government" as:

"The management of the executive department of the government. Those charged with the management of the executive department of the government."

Black's Law Dictionary, Fourth Edition, page 65, defines "administer" as:

"To manage or conduct; to discharge the duties of an office; to take charge of business; to manage affairs; \* \* \*."



Black's Law Dictionary at page 67 defines "administrative officer" as:

"Politically and as used in constitutional law, an officer of the executive department of government and generally one of inferior rank; legally a ministerial or executive officer as distinguished from a judicial officer."

The Fair Labor Standards Act and regulations of the administrator issued pursuant thereto have made definite and clear distinctions between executive positions and administrative positions. See 56 C.J.S., Section 151 (12) b, pages 666-670, and Section 151 (12) c, pages 670-672. While these distinctions between executive and administrative positions in business enterprises have become well established by many cases with much legal writing on the subject, it is likely that the framers of the constitution did not have these definitions in mind.

It seems more likely that the framers of the constitution had in mind an officer or a position more nearly akin to the definition in 67 C.J.S., Officers, Section 3, page 105:

"An officer who is neither a judicial nor a legislative officer necessarily belongs to the executive department of the government, and is an executive or administrative officer, whether it be a state, county, or precinct office. As contradistinguished from judicial officers, all executive officers are ministerial."

See also discussion, 42 Am. Jur., Public Officers, Section 29, page 899-900.

This view is confirmed by the debates on this section of the constitution in the Constitutional Convention. See pages 788-803; 5682-5689; 5716; 5965-5968.

We hold, therefore, that "administrative positions" was intended by the framers of the constitution to mean persons possessing either technical or specialized skill or knowledge in either executive or administrative positions, as well as persons in positions in somewhat more subordinate positions who possessed unusual special training and skills. It was intended to include persons who might be chosen to administer and conduct the affairs of departments, agencies and institutions. We find no evidence that it was intended to apply to boards and commissions.

Referring back again to Section 202.031 respecting the duties imposed on the Mental Health Commission, it is apparent that the primary function of the commission is advisory in nature. Their principal duties are to advise the director with respect to a number of matters set out in the statute. It is possible to say that the commission has one executive function and that is to choose the director. Nevertheless, its principal function is advisory. Nothing in the exception clause of Section 8, Article VII, indicates that it has application to "advisory positions." We, therefore, conclude that the term "administrative positions", as used in the said clause, was not intended to include advisory positions with the state. This being so, the first part of the section is applicable to the physicians appointed as members of the State Mental Health Commission. That is, that they shall be a citizen of the United States and shall have resided in this state one year next preceding their appointment.

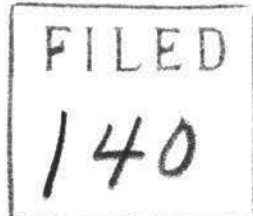
Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JGS:mac

Opinion No. 140  
Answered by Letter (Burch)

March 29, 1965



Dr. H. M. Hardwicke  
Acting Director  
Division of Health  
Jefferson City, Missouri

Dear Dr. Hardwicke:

This is in reply to your recent opinion request which reads as follows:

"Missouri law presently authorizes counties and districts to build and operate nursing homes and levy taxes for this purpose. Considerable confusion has arisen concerning the possibility of a given piece of real property being located both in a nursing home district and in a county which is building or operating a nursing home. This leads to what is commonly referred to as "double taxation". Is this double taxation permissible under existing law?

"House Bill No. 393 has been introduced to eliminate this problem and we respectfully request an opinion as to whether H.B. 393 will accomplish this purpose."

The problem posed by your first question can and does exist under present Missouri law. Sections 198.200 to 198.350 RSMo. Cum. Supp. 1963, authorizes the creation of Nursing Home Districts and specifically states that such district may include municipalities or territory not in municipalities or both or territory in one or more counties; except that Sections 198.200 to 198.350 are not effective in counties having a population of more than four hundred thousand inhabitants, Section 198.200 RSMo. Cum. Supp. 1963. This section further

Dr. H. M. Hardwicke

provides that such districts shall be a body corporate and a political subdivision of the state. Sec. 198.250, RSMo. Cum. Supp. 1963, provides for the levy of a tax not in excess of fifteen cents on the one hundred dollar valuation.

Sections 198.300-310 provide for borrowing money, issuance of bonds for the payment thereof, and the collection of a tax on the tangible property within the district to effectuate such repayment.

At the same time, Section 205.375 provides for the County Court of any county or the township board of any township to acquire land, construct and equip nursing homes. It also authorizes the issuance of bonds and the levy of taxes to provide funds for this purpose.

The definition of the purpose for which a nursing home can be created in 198.300 (7) and in 205.375 (1) is not identical.

Section 198.300 (7) simply states that the nursing home shall be maintained for the benefit of the inhabitants of the area comprising the district, regardless of race, creed, or color; and gives the directors of said district very broad and general powers as to management, operation and purpose. Section 205.375--1, states that a nursing home means a facility for the accomodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services and (1) which is operated in connection with a hospital or (2) in which such nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to practice medicine or surgery in the state.

It would thus seem that the legislature did not intend that the nursing homes created under these two separate statutes serve the same identical purpose or alleviate the same health burden.

Double taxation is not of itself impermissible but becomes so only when it is imposed in a manner violative of the state law, or the Missouri or Federal Constitution. Section 3, Article X of the Missouri Constitution states in part, "taxes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," and it is to those words and their interpretation by the Courts that our attention should be directed in determining what is meant by double taxation, and when it is permissible and when prohibited.

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In State v. Kemp, 283 S.W. 2d 502, 518, the Court adopts the following definition:

"To constitute double taxation in the prohibited sense, the second tax must be imposed upon the same property, for the same purpose by the same state or government (italics added), during the same taxing period."

In State ex rel. Chamberlain v. Young, 167 S.W. 995, the Court stated:

" . . . duplicate or double taxation, obnoxious to the constitutional provisions requiring equality and uniformity, occurs when one person or any one subject of taxation shall directly contribute twice to the same burden (italics added), while other subjects of taxation belonging to the same class are required to contribute but once."

In State v. Koeln, 211 S.W. 31, school taxes were levied upon a corporation by both the state of Missouri and a St. Louis school district. The Court held that no double taxation occurred, and adopted the above definition of double taxation in the Chamberlain v. Young case and went on to state:

"A tax levied and collected by and for a 'school district' is entirely a different burden from the tax levied and collected for state purposes . . . ." (italics added)

In State v. Rooney, 235 S.W.2d 260, a Clay County levee district had been in existence some forty years. Thereafter, the city of Kansas City annexed certain lands located within this county levee district. A landowner in the levee district, whose property was subsequently annexed by the city, sought to prohibit the county levee district from exercising its powers (among which were taxing powers) over property of the landowner annexed by the city. The Court in ruling against the landowner stated that annexation by the city of a part of the territory of the levee district did not take away any of the powers or authority of the levee district in its original area.

The case of St. Louis County Library District v. Hopkins, 375 S.W. 2d 71, is a case in which the facts are analogous to our problem of dual taxation of one piece of property by two



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taxing authorities. In this case the St. Louis County Library District was levying a tax on all taxable property within its geographical boundaries for the maintenance of a free public library. At this time, the boundaries of the County Library District did not include the cities of Florissant and Kirkwood who each had their own free public libraries. Thereafter, these two cities extended their city limits by annexation into the area of the County Library District and began taxing property therein for support of their city libraries. The County Library District then sought a declaration that it had the right to tax, simultaneously with the city, property lying within its original boundaries and now also included by annexation in the city. It was the contention of the cities that their annexed property would be exposed to taxation for both a city and a county library which would result in a constitutionally prohibited form of double taxation.

The Court found that both the County Library District and the city had the authority to levy and tax for the maintenance of their respective libraries and that these two entities were of equal and coordinate power in their respective jurisdictions. The fact that the city annexation resulted in overlapping jurisdiction over the same territory did not cut down or reduce the taxing power of the County Library District.

The Court went on to say,

"No general statute or statutes expressly or by necessary implication direct that when a city annexes territory included in the boundary limits of a county library district, the city pre-empts the territory for library purposes, or that taxes for the support of the county library district may no longer be imposed upon property in the annexed territory. . . ."

Thereafter the Court continued:

" . . . taxation is the rule. Exemption therefrom is the exception."

In conclusion the Court held that there was no constitutional impediment. The two taxes were imposed by two separate taxing authorities, were applied uniformly to their respective areas, and that the principle of uniformity is not violated by levying taxes by two overlapping taxing districts on the same property for similar purposes.

In summary, it is our opinion that "overlapping taxation" could occur under the conditions posed in question one; that counties and nursing home districts are of equal and coordinate power and that their taxing power is co-extensive with their



Dr. H. M. Hardwicke

respective geographic boundaries; that the establishment of a county nursing home in a pre-existing nursing home district or the creation of a nursing home district within a county would not abridge the former taxing powers of either; and lastly, that the imposition of a separate tax, upon the same property, for similar purposes, by two separate taxing authorities is not constitutionally prohibited as long as it is uniformly applied and falls equally upon all taxable property subject to it.

The above case, however, is helpful in suggesting a proper solution to the undesirable consequences of such double taxation in that the last paragraph states:

"If statutory amendment is desirable in the field of overlapping taxation, . . . it is for the General Assembly, not the Courts, to make the necessary alterations."

This brings us then to the question of whether House Bill No. 393 will eliminate this problem.

It is our understanding that your inquiry is whether double taxation would be eliminated where a nursing home district is in existence at the time a township or county nursing home tax is levied. It is our view that House Bill 393 would accomplish this purpose if enacted in its present form.

We express no views as to the constitutionality of House Bill 393.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

CB:df

April 28, 1965



The Honorable E. J. Cantrell  
State Representative  
6th District, St. Louis Co.  
Room 301A, Capitol Building  
Jefferson City, Missouri

RE: House Bill No. 48

Dear Representative Cantrell:

As you will recall, on or about February 15, 1965, you requested an official opinion from this office regarding the constitutionality of pending House Bill No. 48 of the 73rd General Assembly.

After a complete review of the matter, I would have the following comments in regard to your request:

The General Assembly of Missouri as a coordinate branch of the state government has all the legislative powers of the state except that denied it by express limitations of the Constitution. Preisler v. Doherty et al, 365 Mo. 460, 284 SW 2d 427 (banc, 1955). A state constitution is not a grant of power as is the Constitution of the United States, but rather a limitation on that power and therefore, the power of the state legislature is unlimited and practically absolute except for those limitations. Kansas City v. Fishman, 362 Mo. 352, 241 SW 2d 377 (1951).

The power of the General Assembly to enact proposed House Bill No. 48 is unquestionable in light of the above cases unless the state constitution contains an applicable limitation, or a prohibition expressed by the federal constitution is evident. In order to examine possible state and federal constitutional questions, it is first necessary to determine and categorize the function of the Bill.

The subject of the Bill relates to public utilities within the meaning of Chapter 393, RSMo. Chapter 393, RSMo is one of a number of Chapters which in part was enacted under the Public

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Service Commission Law. The purpose of the Public Service Commission Law is to provide a system for regulation of public service corporations. State v. Missouri Southern R. Co., 279 Mo. 455, 214 SW 381 (1919). Such regulation by the state under the Public Service Commission Laws is an exercise of the state's police power. State v. Public Service Commission, 327 Mo. 93, 34 SW 2d 37 (1931). The right of a state to regulate and control public utilities operating within its borders is inherent and is referable to the police power. State v. Local No. 8-6, Oil, Chemical and Atomic Workers Intern Union, AFL-CIO, Mo. (banc, 1958), 317 SW 2d 309. Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits and is an essential attribute of government. Marshall v. Kansas City, Mo. (banc, 1962), 355 SW 2d 877.

In an all conclusive discussion concerning the exercise of police power, the Missouri Supreme Court has clearly defined the state constitutional foundation thereof. In State v. Mo. Pac. R. Co., (banc, 1912), 242 Mo. 339, 147 SW 118, the Court was faced with the contention that a statute requiring payment of employees semi-monthly was unconstitutional. After examining, at length, the defendant's case, the Court concluded that such legislation was a proper exercise of police power within the meaning of the Missouri Constitution of 1875, Article II, Section 3, (now Article I, Section 3) and Article XII, Section 5 (now substantially Article XI, Section 3).

The holding of the Court in the Mo. Pac. Case, supra, has been cited with approval as recently as 1947, in Graff v. Priest, 356 Mo. 401, 201 SW 2d 945.

The exercise of police power by the state is subject also to constitutional limitations as discussed previously. The criteria by which statutory enactments grounded on police power should be examined was stated by Judge Graves in a concurring opinion in the Mo. Pac. Case, supra (1.c 129):

"Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference . . . ."

Whether or not a statute of this nature meets the test of reasonableness is to be decided in the light of liberal construction. The language of Section 386.610, RSMo 1959, declares the construction to be given. That section in part states:

The Honorable E. J. Cantrell  
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April 28, 1965

" . . . . . The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

Laws enacted in the interest of public welfare or convenience should be liberally construed with a view to promote the object in the mind of the legislature. State v. Public Service Commission, supra.

However, this office would call to your attention individual problems that may arise from the application of the proposed Statute which might affect a determination of its constitutionality. Such individual problems do not appear from the face of the proposed Statute and we do not know from our own knowledge particular facts under which any one of the utilities affected might attack the constitutionality of the proposed Statute. Another possible contention for alleged unconstitutionality could be based on Article I, Section 13, of the Constitution of Missouri that no "law impairing the obligation of contracts, or retrospective in its operation," can be made. It is the understanding of this office that some utilities have contracts with their customers: and hence, the contention that this Law might impair the obligation of contract could conceivably be upheld by the courts. Likewise, some fact situation could exist on which the contention of a retrospective Law could be made. In conclusion, this office does not find the Bill under consideration to be unconstitutional on its face.

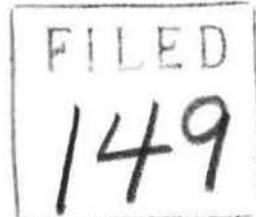
Yours truly,

NORMAN H. ANDERSON  
Attorney General

NHA/hw

March 22, 1965

Honorable John B. McMullin  
State Representative, Butler County  
Capitol Building, Room 304  
Jefferson City, Missouri



Dear Representative McMullin:

Your opinion request of February 24, 1965, reads as follows:

"Senator Tinnin and I have a request from the mayor of the City of Poplar Bluff, Mo. to introduce a Bill that would give the City the right to prosecute people for failing to repair dilapidated and burned out buildings. Also give the Cities the right to remove undesirable buildings when the owners refuse to do so. In my opinion the Legislature does not have the power to give Cities this broad coverage. We would appreciate your opinion. When it is convenient please advise me."

As we understand your inquiry, you desire to know whether the legislature has the power to grant cities authority to effectively regulate dilapidated or undesirable buildings. We believe that this will depend upon the wording of the proposed statute and the fact situation to which it is applied by the city to whom the authority is granted. If the condition complained of constitutes a nuisance within the meaning of Section 71.780, RSMo 1959, then that existing statute may be applicable. Such section provides:

"The legislative or governing bodies of cities organized under the general statutes or special charters shall have, and they are hereby granted, the power to suppress all nuisances which are, or may be, injurious to the health and welfare

Honorable John McMullin

of the inhabitants of said cities, or prejudicial to the morals thereof, within the boundaries of said cities and within one-half mile of the boundaries thereof. Such nuisances may be suppressed by the ordinances of said cities, or by such act or order as the charters of said cities authorize them to adopt. If the nuisance is suppressed within the city limits, the expense for abating the same may be assessed against the owner or occupant of the property, and against the property on which said nuisance is committed, and a special tax bill may be issued against said property for said expenses."

As to the authority of the legislature to empower cities to regulate dilapidated or dangerous buildings, we call your attention to the fact that a comparable authority has in the past been delegated to the cities of St. Louis and Kansas City, respectively, by their city charters.

As to this delegation of authority, the Missouri Supreme Court in *City of St. Louis v. J. E. Kaime & Bro. Real Estate Co.*, 180 Mo. 309, 79 SW 140, 142, said:

" \* \* \* The purposes of the provision of the charter in respect to the removal and repair of dangerous buildings, doubtless, was to avoid any injury to the citizens which might result from such conditions. The limitations of the exercise of the power over this subject to the owners of the property is a reasonable one, and is sufficient to accomplish fully the purposes sought by the charter provisions. And we are unwilling to give our sanction to this ordinance, which undertakes to impose a penalty upon those who have no substantial interests in the property, and to compel them, at their own expense, to remove the dangerous buildings of their principal, for the benefit of the city, without any remedy for any loss they may sustain, when the city has full and ample power to accomplish the same result, with an adequate remedy for the recovery of the cost of such work, against the only party who, upon principles of common fairness and justice, should be made to pay it --



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that is the owner. While it may be convenient, in the exercise of the power granted by the provisions of the charter, to extend the application of the term 'owners' to agents of the owners, it is not a reasonably necessary incident to the express power granted, which confines it to the owners. The rule is that it must not only be 'reasonably incident to the express power granted, or convenient for the exercise of such power,' but it must be essential and indispensable to the purposes to be accomplished by the corporation.

"It is argued that the city would be helpless over this subject, unless this ordinance can be enforced. It is said that the owner may be a nonresident, and cannot be reached. His property can be reached, and there is full authority for reaching it. It is also urged that the agent should suffer this penalty, for the reason that he could have surrendered the property whenever it was ascertained to be unsafe or dangerous. That may be true, but, if the agent surrenders the property, it certainly lessens the force of the contention that the city would be helpless without an agent upon whom to operate. The charter provisions fully meet this condition. The city has a full and complete remedy in either case--agent or no agent. The only difference is that, if this ordinance can be maintained, the city can compel the agent who may have charge of the property to do for it at his own expense that which, in the absence of any agent, it would be required to do for itself at the expense of the owner of the property. If buildings are unsafe or dangerous, the city has full power to remove them or put them in a safe or secure condition, and make the owners of the property pay for them. This sufficiently answers the complaint that the respondent would be without remedy."

Likewise, in *Lux v. Milwaukee Mechanics' Ins. Co.*, 15 SW2d 343, 346, our Supreme Court said:

"We are not holding that a city may not provide by ordinance the circumstances and

Honorable John B. McMullin

conditions which would create an emergency justifying the summary destruction of property in order to protect the lives and property of citizens from an imminent and threatening danger. We recognize that this may be done by a valid ordinance. What we do hold is that the determination of what conditions and circumstances would create such an emergency is a legislative function, to be exercised by the council and not delegated to an administrative officer."

The general principles and limitations involved are set out in McQuillin on Municipal Corporations, Vol. 8, Section 24.505, as follows:

"Generally municipal corporations are empowered to adopt and enforce reasonable ordinances and regulations governing buildings within the municipality: their erection, removal, repair, alteration and reconstruction, and also their use. They may enact and enforce building codes and ordinances and tenement and rooming-house legislation, and they may enact at least under specific statutory authorization, measures relative to housing projects, slum clearance and trailer courts, tourist camps and other unsettled housing of people. But any such municipal measure constitutes an exercise of the police power and to be valid, particularly where it restricts the use of private property, must be reasonably necessary to promote or protect the public health, safety, morals or general welfare. Moreover, not only is it true that the only possible basis to enact and enforce building and housing regulations under the police power is a proper object for exercise of that police power, but it is recognized that such regulation, while it may be broad in scope, is subject to other limitations; it must comply with law, be reasonable, certain, and not arbitrary, oppressive or discriminatory. Nevertheless, it is realized that it is necessary to vest in municipal authorities ample power to regulate the erection, repair and use of buildings. On the one hand, such regulation may often work hardship on owners of property, compelling improvements they do not wish to make or restricting them from improvements they desire to make." (Emphasis added.)

Honorable John B. McMullin

We have issued two previous opinions in regard to the authority to, regulate junkyards (issued to Honorable Clyde Portell on June 13, 1962), and the establishment of minimum housing standards (issued to Honorable E. J. Cantrell on December 31, 1964). We are enclosing copies of these opinions for your convenience.

We are unable to conclusively indicate the effect of your proposed statute since it is not available, but we suggest that the legislature would be limited only to the concept that the legislation must be constitutional and must bear a reasonable relationship to the public health, safety, morals, or other proper object, of the police power of the State.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

CB:df  
Enclosures (2)

SCHOOLS: In a school annexation election re-  
SCHOOL ELECTIONS: sulting in a tie vote a second elec-  
SCHOOL ANNEXATION ELECTIONS: tion is not permitted for two years  
TIE VOTE: under Section 165.300 RSMo. Supp. 1963.

Because Section 165.300 is repealed, effective July 1, 1965, and replaced by 162.441 RSMo. Supp. 1963 Appendix, another election is permitted after July 1, 1965, because a majority of votes cast at the former election was not against annexation.

OPINION NO. 150

May 27, 1965

Honorable Bernard "Doc" Simcoe  
State Representative  
Callaway County  
Capitol Building - Room 306B  
Jefferson City, Missouri



Dear Representative Simcoe:

This opinion is issued in response to your request for an official ruling on the following:

"There is in my county a common or three-director school district which recently held an election on the proposition of annexation. This election was held under the provisions of 165.300, Missouri School Laws, 1960. The result of this election was a tie.

"We would like to know when another election upon this proposition can be held in this district, and is the district bound by Section 165.300 under which they have voted for a period of two years, or would Section 162.441 apply to them after July 1."

Section 165.300 RSMo. Supp. 1963, provides that after the holding of an annexation election, no other such election shall be called within a period of two years. This prohibition applies whether the first annexation election was defeated, passed or ended in a tie. Thus, so long as Section 165.300 is effective, a second annexation election cannot be called in the district to which you refer.

However, in enacting the new school code (Senate Bill No. 3, 72nd General Assembly), the legislature repealed Section 165.300. This repeal will take effect July 1, 1965. Therefore, after that date Section 165.300 will no longer be the law and will not prevent a second annexation election.

Honorable Bernard "Doc" Simcoe

The new school code also provides for annexation elections. See Section 162.441, RSMo. Supp. 1963 Appendix. The new annexation statute (effective July 1, 1965) provides in subsection (5):

"If a majority of the votes cast are against annexation, no other election on the proposal shall be called within two years after the election."

The new statute has materially changed the wording from the former annexation statute. Under the old statute subsequent elections were prohibited for two years regardless of the outcome of the first annexation election. Obviously from the provisions of the new statute the legislature intended to limit the two-year prohibition.

This manifest intent to limit the two-year prohibition leads us to the conclusion that the two-year prohibition applies only to the single instance expressed by the statute, namely, when "a majority of the votes cast are against annexation." When an election results in a tie, there is no majority against.

Furthermore, the two-year prohibition is in derogation of the people's right to hold elections and govern their affairs by democratic process. Thus, the prohibition should be strictly construed.

Therefore, we are of the opinion that the two-year prohibition of Section 162.441 does not apply where the first election results in either a majority in favor or in a tie.


In short, after July 1, 1965, a second annexation election may be held in the school district referred to in your letter.

#### CONCLUSION

In a school annexation election resulting in a tie vote a second election is not permitted for two years under Section 165.300 RSMo. Supp. 1963.

Because Section 165.300 is repealed, effective July 1, 1965, and replaced by 162.441 RSMo. Supp. 1963 Appendix, another election is permitted after July 1, 1965, because a majority of votes cast at the former election was not against annexation.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



OFFICERS:  
COUNTY OFFICERS:  
COUNTY CLERKS:  
COUNTY HIGHWAY ENGINEERS:  
HIGHWAYS:  
COUNTY ROAD FUNDS:

A county clerk or county treasurer of a third or fourth class county may act in the capacity of and receive additional compensation from county revenue funds for: (A) Serving as a duly appointed assistant highway engineer, (B) Clerical or stenographic assistant to the county superintendent of schools, (C) Stenographic or clerical assistant to the prosecuting attorney, (D) Bookkeeper and stenographic assistant to the magistrate, (E) Clerical assistant to the highway engineer.

The county court of a third or fourth class county may, pursuant to Section 61.610, create the office of County Highway Engineer and appoint the county clerk to fill that office; however the term "ex-officio highway engineer" would be improper terminology for designating the title of such officer.

County clerks of third and fourth class counties are not entitled to compensation in addition to statutory amounts for the office of county clerk for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by the County Aid Road Trust Fund.

A county judge may not serve as extra help in the office of the county highway engineer or perform labor or other service in connection with county roads or bridges.

Opinion No. 152

November 4, 1965

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

You have directed four inquiries to this office upon which you request the official opinion of the Attorney General. You have stated your first question as follows:

"1. May any elected and duly qualified county clerk or county treasurer of third and fourth class counties, in addition to the official duties of his office and the compensation provided by statute for the performance of such duties, be appointed, act in the capacity of or receive addi-



Honorable Haskell Holman

tional compensation from county funds for the following?

- A. Be appointed assistant highway engineer?
- B. Clerical or stenographic assistant to the county superintendent of schools?
- C. Stenographic or clerical assistant to the prosecuting attorney?
- D. Bookkeeper and stenographic assistant to the magistrate?
- E. Clerical assistant to the highway engineer?"

1. A county clerk or county treasurer of a third or a fourth class county may be appointed assistant highway engineer under the circumstances and for the reasons stated hereinafter in dealing with the propriety of appointing the county clerk to be highway engineer.

The superintendent of schools is authorized by Section 179.130, RSMo. Cum. Supp. 1963, Appendix, to employ clerical assistance. The prosecuting attorney in class three and four counties is authorized to employ stenographic and clerical help by Section 56.245, RSMo Cum. Supp. 1963. Magistrate courts are authorized by Section 483.485, RSMo, to appoint deputies and employees, including stenographic assistants. Section 61.200, RSMo, authorizes the county highway engineer to appoint one or more assistants.

Section 106.220, RSMo, reads:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which

Honorable Haskell Holman

by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner provided in Sections 106.230 to 106.290."

Section 54.100, relating to county treasurers, has similar provisions.

Sections 106.220 and 54.100, supra, were construed by the Missouri Supreme Court in *State v. Cumpston*, Mo., 240 S.W. 2d 877, which held that those statutes should be given a reasonable interpretation and do not necessarily require a county officer to devote his entire time to the office. If he sees to it that the duties of his office are properly discharged, he complies with the statutes.

Subject to the provisions of Sections 106.220 and 54.100 supra, requiring county officers to personally devote their time to their duties and to perform them in a proper manner there are no statutory or constitutional prohibitions against elected county clerks or county treasurers of third and fourth class counties acting in the capacities enumerated or receiving additional compensation therefor. Such elected officials may occupy other employment, such as those enumerated in your inquiry, unless the office and positions are incompatible. It was held in the case of *State ex rel. McAllister v. Dunn*, 277 Mo. 38, 209 S.W. 110, that an individual cannot hold two offices, the duties of which are incompatible. In accord are the cases of *State ex rel. McGaughey v. Grayston*, 349 Mo. 700, 163 S.W. 2d 335, and *State ex rel. Gragg v. Barrett*, 352 Mo. 1076, 180 S.W. 2d 730. The clerical, stenographic and book-keeping positions involved in your question are not incompatible with the positions of either county clerk or county treasurer and would not present questions of conflict of interest.

2. Your second question is stated as follows:

"Would it be permissible for the county clerk of any third or fourth class county to be designated by the county court as 'ex officio highway engineer' where such

Honorable Haskell Holman

county has no duly appointed highway engineer and receive additional compensation from county funds for preparing plans, specifications and other forms in connection with county road programs financed by funds received by the county from the state motor vehicle fuel tax?"

Sections 51.120 to 51.165 RSMo, set forth the duties of the county clerk. In outline, such duties consist of keeping records of orders, rules and proceedings of the county court, the issuance, attestation and sealing of process, accounting for moneys coming into his hands, keeping official court reports, administering oaths and affirmations, keeping accounts between the county on the one hand and the treasurer and all persons, bodies politic and corporate on the other, filing and preserving accounts, vouchers and other papers pertaining to county transactions, issuance of warrants pursuant to orders of the county court, keeping of the county ward-book, handling social security transactions of the county, making reports to the State Board of Education, inspecting the buildings and personal property of the county, and keeping and filing salary and fee lists.

The duties of the county highway engineer in third and fourth class counties, set out in Sections 61.160 to 61.310 RSMo, consist of custody of tools, material and machinery belonging to road districts and to the county, supervision of public roads of the county and of road overseers, supervision over the construction and maintenance of roads, culverts and bridges, inspection of roads, culverts and bridges and filing reports concerning roads and bridges with the county court and with the State Highway Engineer.

Thus, the duties of the county clerk and the county highway engineer of third and fourth class counties impinge upon each other only insofar as the clerk's issuance of warrants to the highway engineer and the highway engineer's filing of reports with the clerk. The duties of the county clerk do not place him in any way in a position subordinate to the county highway engineer or place the county highway engineer in any respect subordinate to the county clerk. There is no conflict between the powers and duties of the respective offices.

We enclose the opinion of the Attorney General to John A.

Honorable Haskell Holman

Johnson, dated November 19, 1948, holding that a deputy county clerk in a fourth class county may also serve as a county highway engineer. Our present holding is consistent therewith.

It would be improper however to designate the clerk as "ex-officio highway engineer" because this implies the clerk is highway engineer by virtue of his office as clerk, when in fact, he could be highway engineer only by appointment as such by the county court.

3. Your third question is stated as follows:

"Are county clerks of third and fourth class counties entitled to compensation, in addition to the statutory amounts allowable for the office of county clerk, for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by funds received from the state from the County Aid Road Trust Fund?"

Insofar as "keeping records and accounts of . . . county road programs" is concerned, those duties belong to the office of county clerk, and he would not be entitled to additional recompense for such work.

Section 51.120 RSMo 1959, reads:

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; issue and attest all process, when required by law, and affix the seal of his office thereto; keep an accurate account of all moneys coming into his hands on account of fees, costs or otherwise, and punctually pay over the same to persons entitled thereto; provided, that when the clerk of the circuit court of his county is a party, plaintiff or defendant, to a suit or action, the writ of summons and all other process relating thereto shall be issued by the clerk of the

county court, the reason therefor being noted on said process, and said clerk of the county court shall, on the trial of such cause, act as temporary clerk of the circuit court and otherwise perform all the duties of the clerk of the circuit court."

Section 51.150, RSMo 1959, reads:

"It shall be the duty of the clerk of the county court:

"(1) To keep regular accounts between the treasurer and the county, charging him therein with all moneys paid into the treasury, and crediting him with the amount he may have disbursed between the periods of his respective settlements with the court;

"(2) To keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; (sic).

"(3) To file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted in evidence in all courts of law and elsewhere;

"(4) To issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."



Honorable Haskell Holman

It is clear that the above quoted provisions embrace the work of keeping records and accounts in county road programs formulated by the county court.

With respect to "preparing forms for county road programs" we understand that the forms involved would be those set out in the "Operational Procedure Manual for Expenditures from County Road Trust Fund," prepared by the Missouri State Highway Department. The manual describes various forms that are to be attested by the county clerk. All these forms are no more nor less than itemized orders of the county court, embodying reports to the Highway Commission of estimates, requests and progress reports. These forms are clearly covered in Sections 51.120 and 51.150, supra, as "orders, rules, and proceedings of the county court." (Section 51.120, supra), and accounts between the county and . . . bodies politic . . . chargeable with moneys payable into the county treasury," (Section 51.150, supra). Therefore, the county clerk is not entitled to extra compensation for preparing such forms.

4. Your fourth question is stated as follows:

"May any member of the county court of third or fourth class counties serve in the capacity of or receive compensation from county funds for services as follows:

"A. Extra help in office of county highway engineer,

"B. For labor or any other service in connection with the construction, maintenance or repair of any county roads and bridges?"

We hold that a member of a county court is disqualified to work in either the office of county highway engineer or in connection with county roads and bridges, on the ground of incompatibility. State ex rel. McGaughey v. Grayston, supra, 349 Mo. 700, 163 S.W. 2d 335, states the rule thus:

"The settled rule of the common law prohibiting a public officer from holding two incompatible offices at



Honorable Haskell Holman

the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant, or conflicting, as where, for example, one office is subordinate or accountable to the other."

The county court in counties of class two, three and four, appoint the highway engineer, pursuant to Section 61.160 RSMo. Section 61.190 RSMo, provides that the county court fix the salary of the highway engineer. Under Section 61.200 RSMo, the highway engineer may in certain circumstances appoint assistants with the approval of the county court, which sets the salaries of such assistants. The county court establishes and changes roads subject to the approval of the highway engineer under Section 61.220 RSMo. Under Sections 61.270 and 61.280 RSMo, the highway engineer files statements of the condition of the roads and the amount of money available for each district, and recommends what action he considers advisable to be taken by the county court for the repair and improvement of roads.

Thus, the highway engineer is subordinate to the county court and accountable to it. Also, in some respects the county court is dependent upon the county highway engineer. The position of county judge is clearly incompatible with that of an employee of the county highway engineer.

Likewise, the statutes cited in the last paragraph above and other statutes provide that the county court is in charge of the county roads and bridges. Anyone performing a service in connection with county roads and bridges is subordinate and accountable to the county court. An employee performing such service is in a position incompatible with that of a county judge. In *Nodaway County v. Kidder, Mo.*, 129 S.W. 2d 857, the Supreme Court held that the employment of a county judge as an employer and employee is incompatible and prohibited by law. The Court also held that the contracting by a county judge for employment by the county is void as against public policy.

We enclose copies of opinions of the Attorney General

Honorable Haskell Holman

rendered under date of March 7, 1933, to Honorable Virgil L. Rathburn; February 11, 1933, to Honorable T. J. Hager; and May 3, 1937, to Mr. C. E. Jeffries. These opinions require a negative answer to the question whether a county judge can be employed to work on county roads and bridges.

#### CONCLUSION

It is the opinion of this office that:

1. A county clerk or county treasurer of a third or fourth class county may act in the capacity of and receive additional compensation from county revenue funds for:

- A. Serving as a duly appointed assistant highway engineer;
- B. Clerical or stenographic assistant to the county superintendent of schools;
- C. Stenographic or clerical assistant to the prosecuting attorney;
- D. Bookkeeper and stenographic assistant to the magistrate;
- E. Clerical assistant to the highway engineer.

2. The county clerk in a third or fourth class county may not be designated by the county court "ex-officio highway engineer," but the county court could, pursuant to Section 61.610, create the office of County Highway Engineer and appoint the county clerk to fill that office.

3. County clerks of third and fourth class counties are not entitled to compensation in addition to statutory amounts for the office of county clerk for keeping records and accounts of and preparing forms for county road programs formulated by the county court and financed by the County Aid Road Trust Fund.

4. A county judge may not serve as extra help in the office of the county highway engineer or perform labor or other service in connection with county roads or bridges.

Honorable Haskell Holman

The foregoing opinion, which I hereby approve was prepared by my assistant, Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosures



March 30, 1965

Honorable Jack Keane  
State Representative 13th District  
Room 404  
Capitol Building  
Jefferson City, Missouri

Dear Representative Keane:

This letter is in answer to your request for an opinion of this office. Your request reads:

"A boy (Negro) age 16 of St Louis City was sent to the State Training School at Boonville, Missouri. He was assigned to laundry work. During the course of this work an accident occurred and he lost his arm as a result. He has been treated well, his medical expenses paid and a fitting was made for an artificial arm. However, because of the unusual cause of the accident, I feel he is entitled to receive additional damages.

"As I understand it, a safety feature of the machine he was working on was that when the door was open the machine would not operate. This boy was extending his head and arms inside this open door and suddenly the machine started, twisting his arm off. I spoke to the head of the Boonville farm and he told me this machine was "at least 14 years old and that there had been other accidents caused by this same old equipment."

"Norm, this boy is 18 years old now and seems to be suffering a mental condition because of this loss. Can we introduce a 'relief bill' for him? Is he covered by a 'State Self-Insured Plan' comparable to Workmen's Compensation? What can we do?"

The young man referred to in your inquiry is not covered by Workmen's Compensation. Section 216.183 RSMo provides that the State of Missouri is a self-insurer of employees of the Department of Corrections of the state. However, the inmates of the state training schools are not within the Workmen's Compensation Law because they are not employees of such department or of the board of training schools.

As to a "relief bill," the enclosed opinion of the Attorney General to Charles A. Witte, dated June 18, 1951, explains why this is out of the question. Under that opinion, to which we still adhere, the first clause of Section 38(a) of Article III of the Constitution of Missouri, prohibiting the General Assembly from granting public money to any private person, would bar the young man from legislative benefits. Likewise, according to the opinion, a legislative appropriation for the purpose of relieving him would be contrary to the terms of Section 23 of Article III of the Missouri Constitution, as well as Section 33.200 RSMo 1959, making it a felony for the Comptroller to certify any claims or accounts not authorized by law.

Accordingly, we feel that there is no relief available to the young man involved in your inquiry through workmen's compensation, special relief bill or legislative appropriation.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj  
Enclosures



RECORDERS: Recorder must accept for recordation all instru-  
ACKNOWLEDGMENTS: ments that are defined by Sec. 59.330, V.A.M.S.  
PHOTOCOPIES: and in proper form duly acknowledged. Instru-  
ment whose acknowledgments are reproduced are  
not acceptable for filing.

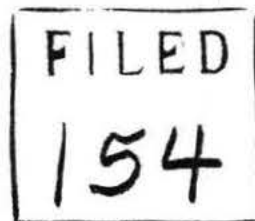
Photocopies or reproduction of acknowledgments  
are not acceptable on instruments offered for  
recordation.

Photocopies of acknowledgments are not acceptable  
for recordation even though a notary seal is  
affixed.

OPINION NO. 154

June 22, 1965

Honorable George C. Baldrige  
Prosecuting Attorney  
Jasper County Court House  
Joplin, Missouri



Dear Mr. Baldrige:

The question submitted by you (as restated by this office)  
whether the recorder of deeds must accept for recording copies  
of the original instrument on which the signatures to said docu-  
ments were photo reproductions of the originals (even though a  
notary seal may have been attached) has been considered by this  
office. Must the recorder indicate on his records in some manner  
that the instrument recorded has a facsimile or photocopy acknowl-  
edgement?

The pertinent portions of the statutes, in substance, are set  
forth below:

Section 59.330, V.A.M.S. What shall be recorded.

"(1) All deeds, mortgages, conveyances, deeds  
of trust, bonds, covenants, defeasances, or  
other instruments of writing, of or concerning  
any lands and tenements, or goods and chattels,  
which shall be proved or acknowledged according  
to law, and authorized to be recorded in their  
offices; \* \* \*

Section 442.380, V.A.M.S.

"Every instrument in writing that conveys any  
real estate, or whereby any real estate may



be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 442.130, V.A.M.S. Execution of deeds and other conveyances.

"All deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed."

Section 442.210, V.A.M.S. Certificate of acknowledgment-- contents.

"3. (In all cases add signature and title of the officer taking the acknowledgment.)"

Section 442.190, V.A.M.S. Certificate, how made.

"Such certificate shall be

\* \* \* \* \*

"(3) When granted by an officer who has a seal of office, under the hand and official seal of such officer;"

Section 59.330 V.A.M.S. provides what instruments shall be recorded by the recorder. If the instrument is subscribed as provided in Section 442.130 V.A.M.S. and acknowledged as provided in Section 442.190 V.A.M.S., the Supreme Court in *Stevens v. Hampton et al* (1870), 46 Mo. 404, 1. c. 408, held:

\* \* \* \* \*

"In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice, the following would seem to be a reasonable rule: that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect."

As stated in the case (supra), when the instrument is fair on its face, it is the duty of the recorder to receive and record it. On the other hand, if the instrument on its face is obviously defective, as where there is no completed acknowledgment, it is the duty of the recorder to reject the instrument for recordation.

See *Williams v. Butterfield et al* (1904), 182 Mo. 181, 81 S.W. 615, affirmed in part (1908), 214 Mo. 23, 114 S.W. 13, where it was held:

"As the record in the court then appeared, there was no certificate of acknowledgment by the grantor on said deed. It was held, and we still think correctly, that by reason of the absence of said acknowledgment, said deed was not entitled to be recorded \* \* \*."

See also *Heintz v. Moore* (1912), 246 Mo. 226, 151 S.W. 449.

The reason seems to be that where recording is provided by statute for specific instruments constructive notice is imposed on all the world. Secondly, parties cannot be expected to search records for that which does not belong there.

The word "shall" as used in Section 59.330 is mandatory, provided the instrument meets the test of the statute, i.e., Sections 442.020, 442.130, 442.380 and 442.190 V.A.M.S. Thus, under 442.130 V.A.M.S. relating to the deed or other conveyance of land or estate or interest therein, a party or his agent must subscribe to the instrument. Such subscription may be by signature or mark duly certified. The court held in *Woods v. Payne* (Supreme Court 1947), 206 S.W. 2d 355, 1. c. 558:

"\* \* \* Whether or not Mrs. Payne actually signed the deed is not all important. There is sufficient evidence to consider the deed as more than a mere evidentiary fact for, if she did not sign the deed, the record justifies findings that her signature appeared there with her approval and authorization and she acknowledged it as her free act and deed. 26 C.J.S., Deeds, § 34a; *Radley v. Meeks*, 178 Mo. App. 238, 240, 165 S.W. 1192, 1193 [3]; *State v. Carlisle*, 57 Mo. 102, 105."

The requirement and necessity for the validity of acknowledgments should be readily apparent as a matter of public policy as a means of reducing possible frauds. The sanctity of records establishing title to real estate or interests therein has a strong historical background. When the grantor could not write, it was the seal of the notary, and his acknowledgment thereon in early English history that guaranteed the validity of a deed



or other similar instruments and so it is today. Public policy demands that the statutes be rigidly adhered to in order to protect the records.

Would a photo reproduction of the acknowledgment with a seal attached of the notary constitute a substantial compliance with the statutes pertaining to acknowledgments? The court stated in *Hatcher v. Hall et al* (1956), 292 S.W. 2d 619, 1. c. 622:

"\* \* \* But, although the law requires nothing more than such substantial compliance, it is satisfied with nothing less. And, since the power to take acknowledgments is derived from the statutory provisions pertaining thereto and acknowledgments may be taken only by a person designated by statute [1 C.J.S., Acknowledgments, Section 41, p. 333], we do not impose 'hypercritical requirements of technical nicety' [McClure v. McClurg, 53 Mo. 173, 175] in concluding, as we do, that 'no rational liberality of construction can cure' [Cabell v. Grubbs, 48 Mo. 353, 357] the patent defects in the 'acknowledgment' to the lease in the instant case, which does not even indicate whether the individual purporting to take such 'acknowledgment' in 1941 was a person then authorized so to do. Section 3408, RSMo 1939. Lacking an acknowledgment substantially complying with statutory requirements, the lease was not entitled to record [see Sections 442.380 and 59.330 (1)], and recordation thereof did not impart constructive notice under Section 442.390 to plaintiff, a subsequent purchaser for value."

In John's "American Notaries" (4 Ed.) p. 160, it states that "The notary's signature should be properly written and affixed."

Thus in *Salazar v. Taylor* (Colorado-1893), 33 Pac. 369, 370, it was held:

"The word 'hand' in legal parlance, is often used to denote handwriting or written signature, as 'witness my hand and seal' or 'witness my hand' if the instrument be not under seal. The word is thus used in our statutes. In certain cases, a judge or justice of the peace is authorized to issue a warrant under his hand. This undoubtedly means a writ or process in writing

signed by the judge or justice, and when thus issued it is declared to be valid, without any seal."

In *Pinkham v. Jennings* (Maine--1923), 122 Atlantic 873, it was held:

"While the seal upon a writ is a matter of substance and not amendable \* \* \*, it emphatically follows that the signature of the clerk of courts or his deputy, which is required to be fixed by his own hand (R.S.C. 82 §5) is indispensable to the validity of any writ issuing from the court of which he is clerk."

In *State ex rel. Drucker v. Reichle* (Ohio-1848), 81 N.E. 2nd 735, 736, it was held under their statute, the court must approve journal entries of judgments "in writing" before the clerk may file the same:

"The clerk must therefore make certain that the journal entry was in fact approved 'in writing' by the judge and he should not be subjected to chance for error that might result from the unauthorized use of a rubber stamp."

The reason for the rule against accepting facsimiles or reproductions of acknowledgments is that the record should not be subjected to the chances of error that might result from the fraudulent use of a reproduced signature. A seal may be affixed fraudulently, and the use of such seal by itself does not import a verity. As a matter of public policy and to secure the sanctity of records, only those qualified documents under 59.330 V.A.M.S., when duly acknowledged, should be accepted for recordation.

As stated in 1 C.J.S., p. 847:

"It would seem that an official certificate cannot exist without the signature of the officer making it; for this reason the subscription of a certificate of acknowledgment by the officer making it is to be regarded as a part thereof, and statutes requiring subscription must be complied with."

In view of the disposition of the first question presented by the prosecuting attorney (*supra*), the second question presented by you is moot and need not be answered.



Honorable George C. Baldrige -6-

The review purports to deal only with general guidelines for recordation. Each instrument presented for recording is a separate problem which must be resolved on a case-by-case approach and determined on its individual merits.

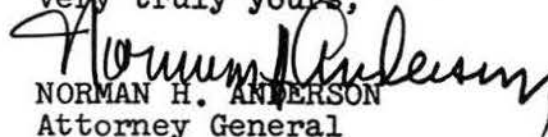
#### CONCLUSION

It is the opinion of this office that (1) the recorder may not properly accept for recordation any instrument affecting title to real estate under the statutes that does not meet the requirements of the statute as to form and content; (2) that photo reproductions of the signature of the notary on the acknowledgment, by whatever means, even though a seal may have been affixed, does not meet the requirements of Section (3) of 442.190 V.A.M.S. so as to entitle such instrument recordation.

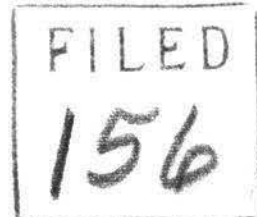
It is emphasized these conclusions are very broad in scope and have as their purpose the promulgation of general guidelines. However, a caveat is urged to the effect that the eligibility for recordation of a particular instrument is a separate, specific question that must be determined on the facts in each particular instance. There is no formula to answer all the questions on this subject.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, R. C. Ashby.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

April 7, 1965



Mr. Clifford L. Summers  
Executive Director  
Water Resources Board  
P. O. Box 271  
Jefferson City, Missouri

Dear Mr. Summers:

This letter is in response to your request of March 3, 1965, for an official opinion concerning the authority of the Water Resources Board to provide reasonable assurances as to the use and repayment of storage costs allocated to municipal and industrial water supply in the Joanna Dam and Reservoir project.

We note that House Bill No. 95, with an emergency clause, has been passed by the 73rd General Assembly and approved by the Governor. Section 3 of this Act provides as follows:

"The water resources board is authorized to make reasonable assurance that demands for use will be made within a period of time to permit payment of costs allocated to water supply within the life of the project, and upon receipt of specific appropriations from the fund may enter into contract with the appropriate federal departments for purposes of discharging non-federal responsibilities relating to municipal and industrial water supply storage as permitted by applicable federal legislation on water resource projects and, in so doing, shall consider the projected water needs of the area that can be served



Mr. Clifford Summers

by the project and shall also consider  
the ability of future users to reimburse  
any investment of funds that may be made  
by this state."

We believe that in compliance with the Water Supply Act of 1958 and the commitments provided for therein by the local political subdivision, the Water Resources Board of Missouri is authorized by House Bill 95 and particularly Section 3 thereof, to give the "reasonable assurances" provided by the said laws.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

CB:df

SCHOOLS:

ANNEXATION:

ELECTIONS:

TIME:

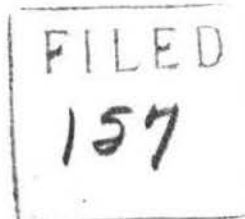
1. Where more than one petition to call an annexation election is presented to a school board, the board has a duty to order an election upon the first valid petition before the remaining petitions are acted upon;

2. Where an annexation election has been held and an annexation offered, the receiving district must act upon the annexation within a reasonable time. A delay of nine months in acting upon an annexation offer is not unreasonable as a matter of law, but depending on the circumstances of each case, may be considered unreasonable by a court.

OPINION NO. 157

August 4, 1965

Honorable Alden S. Lance  
Prosecuting Attorney  
415 West Main Street  
Savannah, Missouri



Dear Mr. Lance:

This opinion is issued in response to your request for an official ruling.

You make two inquiries:

- 1.) Where three petitions to call annexation elections are presented to the school board at different times, may the board ignore the first two petitions and order an election upon the third and last filed petition?
- 2.) Where a district has held an election and approved annexation of the whole district to another district, would acceptance by the board of the annexing district be valid if delayed until nine months after the election and offer to annex?

I.

Your first inquiry was answered by this office in Opinion No. 38 issued 4-27-59 to Warren E. Hearnese (copy enclosed). We ruled therein that where more than one petition to call an annexation election is submitted to a school board, it is their duty to call an election on the first petition received.

Honorable Alden S. Lance

In State ex rel. Kugler v. Tillatson, Mo., 312 S.W.2d 753, the Missouri Supreme Court stated, regarding annexation elections, at l.c. 756: "Assuming that a concededly valid petition is presented; then the duties of the Board are merely ministerial; namely, to post the notices and present the proposition to the voters."

You have not informed us that any of the three petitions were invalid. It is our opinion that the school board had a duty to call an election upon the first valid petition.

## II.

You inform us that the annexation election was held in June, 1964, and acceptance by the receiving district was made in March, 1965.

Section 165.300(2), RSMo. Supp. 1963 (then in effect), provides that after the annexation election is held:

"2. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or town school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action."

(NOTE: Section 165.300 was renumbered by the new school code effective July 1, 1965, and is now Section 162.441, RSMo. Supp. 1963 Appendix. The new law authorizes only annexation of whole districts.)

The statute does not specify a time within which the annexation must be accepted by the annexing district. Thus, a reasonable time is implied.

" \* \* \* Although the section does not specify the length of time within which the board in the annexing district must act the law would supply the deficiency and require



Honorable Alden S. Lance

the board of directors to meet within a reasonable length of time to consider the advisability of accepting the released territory, so that no extended hiatus would occur in any event between the action of one board and the action of the other. In the meantime the original district in which the vote took place would be obligated to continue to maintain the schools, so that the provision of educational facilities would not be interrupted." State at inf. of Taylor v. Reorganized School District R-3, 257 S.W.2d 262, 266.

We are informed that the board of the annexing district about which you inquire met soon after the election and voted to table the annexation request. Nine months after the election they again considered acceptance. Is this delay unreasonable?

In State at inf. of Taylor v. Reorganized School District R-3, quoted supra, the annexing district delayed acceptance two and one-half months. The court held this delay not unreasonable as a matter of law.

In Mullins v. Eveland, Mo.App., 234 S.W.2d 639, a petition seeking consolidation was filed with the county superintendent. He took no action for 18 months. The court held this delay to constitute abandonment of the consolidation.

Delay in pursuing a reorganization plan was considered in State ex rel. Dalton v. Reorganized District No. 11, Mo., 307 S.W.2d 501. The court held that the facts in each case must be examined to determine whether a delay in acting is unreasonable.

Based upon our review of the above cases we are of the opinion that a nine-month delay is not unreasonable as a matter of law. When all material facts are presented, a court may or may not hold this particular delay to be unreasonable.

The question here, of reasonable delay or not, is one of fact. As such, it can be properly decided only in an adversary proceeding where evidence can be heard and judged.

Therefore, this office cannot properly rule upon your second inquiry other than to provide the guidelines as set out above.

Honorable Alden S. Lance -

CONCLUSION

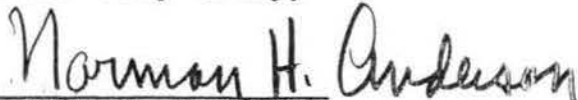
Therefore, it is the opinion of this office that:

1. Where more than one petition to call an annexation election is presented to a school board, the board has a duty to order an election upon the first valid petition before the remaining petitions are acted upon;

2. Where an annexation election has been held and an annexation offered, the receiving district must act upon the annexation within a reasonable time. A delay of nine months in acting upon an annexation offer is not unreasonable as a matter of law, but depending on the circumstances of each case, may be considered unreasonable by a court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure



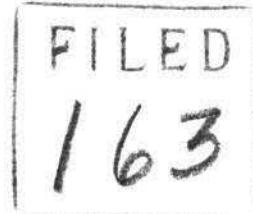
AUDITOR:  
BONDS:

The state is authorized to purchase a blanket bond to cover all examiners of the Office of State Auditor, if such blanket bond covers each examiner individually in the sum of \$10,000.00.

OPINION NO. 163

March 30, 1965

Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri



Dear Mr. Holman:

Your recent request for an opinion asks whether the state is authorized to purchase a blanket bond to cover all examiners of the Office of State Auditor. The examiners presently have individual bonds.

It is noted that every examiner of the Office of State Auditor is required by Section 29.070 RSMo to give a faithful performance bond in the amount of \$10,000. The pertinent part of the statute reads as follows:

"\* \* \* And every examiner shall enter into a bond, payable to the state of Missouri, in the sum of ten thousand dollars, to be approved by the state auditor and deposited in the office of the state treasurer conditioned that he will faithfully perform his duties as such examiner, \* \* \*"

This office recently rendered Opinion No. 62 to Mr. John Vaughn on January 19, 1965. This opinion concluded that under a statute requiring the agents of the Department of Liquor Control to each be bonded in the sum of \$5,000.00, a blanket bond may be purchased by the Department of Liquor Control if the blanket bond covered each agent, individually in the sum of \$5,000.00.

The statute considered in Opinion No. 62 was Section 311.620, RSMo which provides:

"3. The agents, assistants, deputies and inspectors \* \* \* shall each give bond to be approved by the supervisor of liquor control for faithful performance of the duties of their respective offices and to safely keep and account

Honorable Haskell Holman

for all moneys and property received by them. This bond shall be in the sum of five thousand dollars, and the cost of furnishing all such bonds shall be paid by the state."


The similarity between this statute and Section 29.070 RSMo, supra, is readily apparent. Therefore, the reasons set forth in Opinion No. 62 apply equally well to Section 29.070, RSMo. The purpose of the statute is to guarantee the faithful performance of the examiner's duties and to further safeguard the public. This purpose may be achieved equally well by a blanket bond covering each examiner individually in the amount of \$10,000.00 as by individual bonds for each examiner. The fact that such blanket bond would cost the state less money than individual bonds (without a decrease in the coverage provided to the public) further serves public policy and recommends the blanket bond in preference to individual bonds.

#### CONCLUSION

Therefore, it is the opinion of this office that the state is authorized to purchase a blanket bond to cover all examiners of the Office of State Auditor, if such blanket bond covers each examiner individually in the sum of \$10,000.00.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

JDF:bf

Enclosure

May 12, 1965



Honorable Jasper M. Brancato  
Missouri State Senator  
Room 320  
State Capitol Building  
Jefferson City, Missouri

Dear Senator Brancato:

You have requested an opinion of this office regarding the validity of Sections 3, 8, 12, 19, 39, 40, 41, 42 and 43, of the rules and regulations of the State Board of Barber Examiners filed in the office of the Secretary of State on October 8, 1964.

Rules and regulations issued under authority of and pursuant to law carry a strong presumption of validity; *Edwards v. Owens*, 137 F.Supp. 63. Administrative rules are prima facie reasonable and the burden rests on those who contend that a rule is invalid to prove facts to show the invalidity of a rule, and only in a clear case does a court hold a rule invalid on the ground of unreasonableness; *King v. Priest* 357 Mo. 68 206 S.W. 2d 547, Appeal Dism. 333 U.S. 852 68 S.Ct. 736, rehearing denied 333 U.S. 878 68 S.Ct. 901.

A public administrative body may make only such rules and regulations as are within the limits of the express powers granted to it or such as may be reasonably implied therefrom and within the boundaries established by the standards and limitations of the statutes giving it such power. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute or which are in derogation of or defeat the purpose of a statute. Rules and regulations cannot amend, alter, enlarge, or

limit the terms of the legislative enactment. *Urie v. Thompson* 357 Mo. 738, 210 S.W. 2d 98; *State ex rel Springfield Warehouse and Transfer Company v. Public Service Commission*, 240 MoApp 1147, 225 S.W. 2d 792.

Sections 328.060, 328.080, 328.090 and 328.120, RSMo, 1959, govern the subjects covered by the rules involved in your inquiry.

Section 328.060 states:

"The board shall, with the approval of the division of health of the state department of public health and welfare prescribe such sanitary rules as it may deem necessary to prevent the creation and spread of infectious and contagious diseases. A copy of such rules shall be posted in a conspicuous place in every barber shop and barber school or college in this state."

Section 328.080 provides for, among other things, examination of applicants for registration as barbers, and states that the Board of Barber Examiners shall be the judge of whether barber schools are properly appointed and conducted under proper instruction to give sufficient training in the trade of barbering.

Section 328.090 provides for examination by the barber board of applicants desiring to teach barbering and for annual registration of instructors.

Section 328.120 states:

"1. Any firm, corporation or person desiring to conduct a barber school or college in this state, shall first secure from the board a permit to do so, and shall keep the same prominently displayed. There shall be an annual fee for the permit of one hundred fifty dollars to be paid on or before June thirtieth of each year. The board

shall have the right to pass upon the qualifications, appointments, and course of study in the school or college, and the power to revoke any permit issued hereunder for any violation of the provisions of this section. Permits shall not be restricted to any one group or person but shall be granted to any reasonably qualified person or group under a fair and nondiscriminating method of determination.

"2. There shall be not less than one teacher or instructor for every ten students in any barber school or college holding a permit under this section.

"3. The barber school or college shall immediately file with the board the name and age of each student entering the school, and the board shall cause the same to be entered in a register kept for that purpose. A registration fee of five dollars shall be paid to the treasurer of the board by the student.

"4. The barber school or college shall certify to the board the names of all students who successfully completed a course of study approved by the board and consisting of at least one thousand hours of study under the direct supervision of a licensed instructor in a period of not less than six months."

Under these statutes, the scope of the rule-making power of the Board of Barber Examiners is limited to sanitary regulations, and regulations concerning qualifications, appointments and course of study in barber schools.

We turn to the rules and regulations of the Board of Barber Examiners. Rule 3 reads:

"All barber schools must have at least one qualified manager who is a resident of the State of Missouri, and one assis-



tant manager, at least two qualified teachers or instructors; and no one shall be permitted to serve as manager, assistant manager or teacher or instructor in any barber school in this State until he has first appeared before the State Board of Barber Examiners for an examination as to his qualifications, and passed a satisfactory examination to qualify for a permit to manage school, or instruct in the occupation of barbering."

If this rule should be construed to require managers who do not actively engage in teaching to pass an examination before the board, there is no statutory basis for the part of the rule so construed. There is likewise no statutory authority for the requirement of a minimum number of instructors or the provision that a school must have an assistant manager. The only valid portion of the rule is that requiring an instructor to pass an examination before the board. This merely repeats the requirement found in Section 328.090, RSMo 1959.

Rule 8 reads:

"No student shall receive pay or be allowed rebates, refunds, or commissions on any money taken in at his chair when rendering services on a patron, nor shall he be permitted to remain in school and work for pay after the one thousand hours or six months course is completed."

This rule is invalid. It would deprive students of the gains of their industry as prohibited by Const. Art. I, Section 2. Such was the holding in *Moler v. Whisman*, 243 Mo. 571, 147 S.W. 985. The prohibition in the rule against remaining in school and working for pay after completing the course of study does not affect sanitation and does not pertain to the "qualifications, appointments or curriculum of barber schools."

Respecting the last sentence in Section 12 granting the board the power to regulate the opening and closing of the schools to coincide with the hours established by local barber shops in the city. We think it would be proper for the board to establish days and hours of

instruction to be followed by all barber schools, under its supervisory authority over the curriculum. However, the sentence as it stands making the hours of barber schools coincide with the hours established by local barber shops has no relation to curriculum or instruction of students as such. Following the same time schedule as barber shops does not tend to improve the instruction of students. The only purpose of the quoted part of the rule is to prevent competition between barber schools and barber shops in the same area. Such purposes are beyond the purview of the board's functions as defined by the above statutes.

Section 19 requires a passing grade of 90% for an instructor. It is our view that the subject of this rule is within the statutory competence of the board, granted by Section 328.090, providing for an examination by the board of prospective instructors. Such examination, of course, should cover only those subjects included in the approved barber school curriculum.

Rule 39 reads:

"The school must be financially sound. The financial resources of the institution would be considered adequate at an overhead operational balance of \$35,000.00 to continue operation throughout the length of the training course offered without approval for veterans training."

Rule 39 by its terms seems to be advisory only, yet the board is probably without power to fix any arbitrary amount that a school must have as an operational balance. Section 328.120 as stated gives the board power to pass upon the "qualifications, appointments, and course of study in the school or college." This language clearly implies that the board may properly ascertain that the school is financially sound. Perhaps many factors should be considered in determining financial stability for the protection of students and the public interest. Hence a rule of the board to require a school to show financial soundness, taking into account all the factors and circumstances surrounding the proposed school, would be valid. Arbitrary amounts of liquid assets required by the rules should be avoided.

Rule 40 reads:

"Either the manager or at least one assistant manager of the school must have a background of experience or training as a manager and instructor in a public or private barber school in the State of Missouri for at least five (5) years, and be qualified for a permit in accordance with Section 3 of these rules and regulations."

We consider this section to be invalid. It is infected with the same vice as Rule 3, to which it refers and which is discussed above.

Rule 41 reads:

"All applicants for instructor's license shall have been a registered and practicing barber for a period of five years next preceding the date for application for examination as a teacher or instructor."

This rule is contrary to Section 328.090 RSMo 1959, which states:

"Any person desiring to teach barbering in this state in a barber school, college or barber shop must first possess a certificate of registration to practice the occupation of barbering and make application to appear before said board for an examination as a teacher or instructor in said occupation and shall pay an examination fee of twenty-five dollars, whereupon said board shall proceed to examine such applicant and after finding that he is duly qualified to teach said occupation, said board shall issue to him a certificate of registration entitling him to teach barbering in this state, subject to all the provisions of this chapter. Holders of

certificates to teach barbering shall, annually, on or before the expiration of their respective certificates, make application for the renewal of same, and shall in each case pay to the treasurer of said board the sum of ten dollars therefor. Should any person holding a certificate to teach barbering fail to renew same within the time prescribed herein, such person shall be required to pay the sum of ten dollars, in addition to the regular registration fee provided for herein. Any person failing to renew his certificate of registration to teach barbering for a period not exceeding two years may reinstate said certificate of registration upon the payment of ten dollars for each delinquent year in addition to the ten dollars reinstatement fee prescribed herein, but any person failing to renew his certificate of registration to teach barbering for a period exceeding two years and desiring to be reregistered as a teacher of barbering in this state will be required to appear before said board and pass a satisfactory examination as to his qualifications to teach barbering and shall pay the regular examination fee as is prescribed in this section."

This statute completely spells out all qualifications necessary to become an instructor. The rule violates the principle that a statute may not be enlarged by administrative rule.

Rule 42 reads:

"There shall not be but one school in any city with a population less than 400,000 and for each additional school there should be a population of at least 600,000."

The language of this rule is unclear. We are informed by the board that it means that a city of 400,000 or lower population can have one school; a city of 600,000 population can have two schools; a city of 800,000 can have three schools, and so on, allowing an additional school for each 200,000 population. This interpretation of the rule appears to be contrary to the language used. This rule has no statutory basis. Chapter 328, RSMo 1959, supra, contains no provision regarding restriction of the number of barber schools. To the contrary, Section 328.120 RSMo 1959 states in part, "permits [for barber schools] shall not be restricted to any one group or person but shall be granted to any reasonably qualified person or group under a fair and non-discriminating method of determination." Rule 42 of the rules is invalid.

Rule 43 reads:

"Holders of certificates to teach barbering in the State of Missouri must teach barbering in the State of Missouri for at least one year out of the forthcoming five years from this date (June 30, 1964) or will be required to appear before said Board and pass a satisfactory examination as to his qualifications to teach barbering in a school in the State of Missouri."

This rule is invalid because in conflict with Section 328.090, supra.

I believe this fully responds to your inquiries.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj



May 24, 1965



Honorable Gerald Kiser  
Prosecuting Attorney of Clay County  
Clay County Court House  
Liberty, Missouri

Dear Mr. Kiser:

We are in receipt of your letter of March 8, 1965, requesting an opinion regarding the division of the county into two districts under Section 49.010 RSMo, 1959. Your letter is as follows:

"I have been requested to ask an opinion regarding Section 49.010 which provides for the composition of the County Court and the division of the county into districts.

"The Section provides in part as follows: 'and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships.'

"Many years ago when the County Court was first constituted Clay County was divided into two districts which complied with the population provisions of this statute. However, at the present time, the Western County Court District exceeds in population many times that of the Eastern District. This results from the extension of Kansas City into the Western part of our County.

"The questions are as follows:

"1. Does the County Court have the power to re-district the county so that the population of the two districts will be more equal?

"2. If the County Court does have the power to re-district, is it the duty of the County Court to re-district under this statute?"

Section 49.010 RSMo, 1959, provides that the County Court shall divide the county into "\* \* \* two districts of contiguous territory, as near equal in population as practicable.\* \* \*"

This office recently passed on this question in a letter written to Clifford A. Falzone under date of March 30, 1965, relating to County Judge Districts and we are enclosing a copy of that opinion herewith.

We are also enclosing a copy of an opinion written to Charles V. Barker, dated June 19, 1952, which opinion is referred to in the Falzone letter. We believe that these will supply the answer to your first question.

In regard to your second question as to whether or not it is the duty of the County Court to redistrict under this statute, we refer you to the language of the statute which states that "Each county shall be dis-tricted by the County Court into two districts." (Emphasis supplied).

Therefore, since Section 49.010 is couched in mandatory terms, the county court must redistrict the county so as to equalize the population of the two districts when there has been such a great shift of population or influx of new residents that there is a substantial disparity in population between the two districts.

Therefore, it is the opinion of this office that  
(1) the County Court has a right to divide a county into

Honorable Gerald Kiser

-3-

two equal districts, according to their population, for the purpose of electing judges of the County Court, and (2) it is the duty of the court to do so as soon as conveniently possible.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Enclosures (2)

OHS/sj

April 5, 1965



Honorable James T. Riley  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Mr. Riley:

The following is in answer to the question submitted to this office by you as stated in a letter from the Honorable Guy M. Sone, Clerk of the Circuit Court of Cole County, Missouri, addressed to your office. Mr. Sone's letter, in part, stated:

"In submitting Bills of Costs to the Office of the Comptroller, State of Missouri, where more than one defendant has entered pleas of guilty and sentenced to the Department of Corrections, I include on all my fee bills 15¢ for each plea of guilty.

"In other words, if there are two defendants, then I enter fees of 15¢ for each defendant or a total of 30¢. If there are five pleas of guilty in one case, then I tax the costs as 75¢.

"The Criminal Costs Clerk will allow only one plea of guilty, regardless of the number of defendants. He relies on an opinion of the Attorney General under date of April 2, 1948."

It should first be noted that the Opinion referred to in Mr. Sone's letter, which was issued April 2, 1948 to the Honorable H. Glen Weber does not control in the question raised above. The question of whether or not a judgment rendered against co-defendants in a criminal proceeding may be assessed as one or two judgments is not in point.

The question raised in Mr. Sone's letter is confined to fees assessed upon entry of a guilty plea. Without question, each

Honorable James T. Riley      -2-

defendant individually enters a judgment plea. While there are no Missouri cases in point, the Supreme Court of Indiana was faced with such a problem. In State vs. Kinneman, 39 Ind. 36, the Court held that where each of two defendants pleading guilty and the statute provided a fee on plea of guilty, there must be as many pleas entered as there were defendants who so pleaded.

It is the opinion of this office that Section 483.530, RSMo 1959, authorizes a fee on plea of guilty and that the Clerk is entitled to assess such a fee on each individual plea of guilty.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

WAP:mac

cc: Hon. Guy M. Sone, Clerk  
Cole County Circuit Court

Mr. Bud Renn  
Criminal Costs Clerk  
Division of Budget and Comptroller



COUNTY COUNSELOR:  
ATTORNEYS:  
SPECIAL ROAD AND BRIDGE  
FUND:

Special Road and Bridge Fund of  
Jackson County cannot be used to  
pay salary of an Assistant County  
Counselor of Jackson County.

OPINION NO. 170

April 28, 1965



Mr. Harold L. Fridkin  
County Counselor  
Jackson County, Missouri  
Suite 205 Court House  
Kansas City, Missouri 64106

Dear Mr. Fridkin:

In your letter of February 8, 1965, you requested an opinion  
from this office as follows:

"Can the County Counselor of Jackson County,  
within the meaning of Section 56.650 RSMo.  
1959, appoint an Assistant County Counselor  
for the purpose of working specifically with  
problems dealing with the Highway Engineer  
and have compensation for such assistant  
county counselor paid out of the Highway Engi-  
neer's Special Road and Bridge Fund rather  
than out of the General Fund of the County?"

Section 56.630, Mo. Cum. Supp. 1963, establishes in counties,  
of the first class not having a charter form of government, a law  
department with the county counselor appointed by the county court  
at a salary of \$12,000 per year. Jackson County is within this clas-  
sification.

Section 56.640, RSMo 1959, defines the duties of the county  
counselor and his assistants as follows:

"The county counselor and his assistants under  
his direction shall represent the county and all  
departments, officers, institutions and agencies  
thereof, except as otherwise provided by law and  
shall upon request of any county department, of-  
ficer, institution or agency for which legal counsel  
is otherwise provided by law, and upon the approval  
of the county court, represent such department, of-  
ficer, institution or agency. He shall commence,

prosecute or defend, as the case may require and exercise exclusive authority in all civil suits or actions in which the county or any county officer, commission or agency is a party, in his or its official capacity, draw all contracts relating to the business of the county and shall represent the county generally in all matters of civil law, and shall upon request furnish written opinions to any county officer or department."

Section 56.650, RSMo 1959, defines the term of office of the county counselor, provides for additional duties, including each sitting of the county court, and advising the county court on all legal questions. Said Section further provides:

" . . . The county counselor shall be authorized to employ such office personnel as may be necessary in the discharge of his official duties and such employees and assistants shall hold their positions at the pleasure of the county counselor and be paid monthly by the county court out of the county treasury. The county counselor shall be authorized to appoint such assistants as may be necessary in the conduct of said office, who shall receive as compensation such salary as may be approved by the county court."

Section 61.010, RSMo 1959, provides for the election of a county engineer in class one counties who shall hold his office for a term of four years and shall be the chief officer in the county in all matters pertaining to the highways, roads and bridges.

Section 61.070, RSMo 1959, provides that the county highway engineer shall have direct supervision over the maintenance, repair and construction of all highways, roads and bridges, and that the expenditures of all county road and bridge funds shall be approved by the county court.

Other statutory provisions define the duties of the county highway engineer including the making of annual reports to the county court.

As heretofore stated, Section 56.640, supra, requires the county counselor and his assistants to advise and represent the county and all departments, officers, institutions and agencies thereof in all civil law matters in which they are interested. Certainly, this includes the county engineer in all matters within

his jurisdiction as a county official. In other words, advising and representing the county engineer in all legal matters concerning his official duties comes within the official duties of the county counselor.

Section 61.060, RSMo 1959, authorized the county highway engineer to employ technical and professional help and assistants necessary in the performance of his work. It does not expressly authorize him to employ legal counsel. In the absence of any express statutory authority to employ legal counsel and in view of the fact that it is the duty of the county counselor to furnish him with legal advice, it is our opinion that the county highway engineer does not have any authority to retain legal counsel. *Aetna Ins. Co. et al v. O'Malley*, 124 S.W. 2d 1164.

Section 137.555, RSMo 1959, provides that the county court, in their discretion, may levy an additional tax not exceeding 35¢ on each \$100 assessed valuation, all of such tax to be collected and turned into the county treasurer, where it shall be known as "The Special Road and Bridge Fund" to be used for road and bridge purposes and for no other purpose whatever.

Section 50.550, RSMo 1959, under the County Budget Law, which applies to Jackson County, requires that the receipts from the special tax levy for road and bridge purposes shall be kept in a special fund and expenses for roads and bridges may be charged to the special fund.


As heretofore noted, Section 56.560, supra, provides for the county counselor and assistants to be paid monthly by the county court out of the county treasury. There is no statutory authority authorizing the county court to use any of the Special Road and Bridge Funds to pay the salary or expenses of the county counselor or his assistants, and in the absence of such authority, the county court does not have it.

#### CONCLUSION

It is the opinion of this office that the Special Road and Bridge Funds cannot be used to pay the salary of an assistant county counselor in Jackson County.

The foregoing opinion, which I hereby approve, was written by my Assistant, Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

June 14, 1965



Honorable Ralph E. Smith  
Prosecuting Attorney  
Bates County  
First National Bank Bldg.  
Butler, Missouri

Dear Mr. Smith:

This is in answer to your request for an opinion of this office concerning the Countryside Nursing Home which reads as follows:

"The Assessors Office has contacted me with regard to taxability of a newly constructed rest home in the City of Butler. The rest home was constructed at a cost of probably more than One Hundred Thousand Dollars and in the original instance was constructed by the Sunset Vue, Incorporation, a corporation set up by a group of local business men. Shortly after the completion of construction a new corporation was set up, the Countryside Nursing Home, Inc., and this corporation was set up under the general not for profit corporation act of Missouri, a copy of their Articles is enclosed. The new corporation was incorporated by the original parties who set up the Sunset Vue, Corporation. Of course, the not for profit corporation took over the operation of the rest home and as a part of the transfer they are to reimburse the original incorporators and share holders for their investment. Since the new corporation has been established they have sold revenue bonds, drawing six percent interest, to provide the capital necessary to purchase the rest home from the original incorporators and to pay off the

general indebtedness. Also provided in the bonds is a sufficient sum to make some additions and to, perhaps, double the size of the rest home. Mr. H. H. McNabb, a local attorney, assisted in the establishment of these corporations and has furnished a copy of the Articles of Incorporation of the Countryside Nursing Home, Inc., and a copy of his transmittal letter is enclosed.

"I would appreciate an opinion from your office concerning the taxability of this rest home."

In the Articles of Incorporation which you have enclosed, the purposes of the corporation are set out as follows:

"5. The purpose or purposes for which the corporation is organized are: Exclusively charitable, benevolent, eleemosynary, social welfare, health and social, and primarily in furtherance of such purposes, to construct, operate and maintain a retirement home, or nursing home for elderly persons."

The maintenance of a retirement home or nursing home for elderly persons may be done in a purely charitable capacity and thus be exempt from taxation as provided in Article V, Section 6, Constitution of Missouri, 1945, as implemented by Section 137.100, RSMo.

However, the question of whether a particular corporation is tax exempt is not governed merely by the purposes of the corporation but whether it is in fact acting as a charitable institution.

We have enclosed herewith a copy of our opinion to the Honorable C. M. Hulen, Prosecuting Attorney of Randolph County on February 12, 1959, in which we considered the same question relating to the status of the Community Memorial Hospital of Moberly, Missouri. The observations in this opinion should be of aid to you in determining whether the Countryside Nursing Home, Inc. is in fact operating as a charitable institution, and exempt from real and personal property taxes.

We also enclose a letter written on March 5, 1965, to the State Tax Commission of Missouri in which we stated that a private corporation which issued revenue bonds for practically the entire cost of construction of its facilities and was to pay off such revenue bonds from its income was not exempt from property tax even



Honorable Ralph E. Smith

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though the corporation was organized as a not-for-profit corporation for a charitable purpose. The similarity between the facts set out in this letter and those you have set forth indicate that the Countryside Nursing Home, Inc. might not be tax exempt.

However, the question of whether a particular association is exempt from property tax must be decided in each case on all of the facts and we are not in position to make a definite decision on the matter.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Encl (12)

April 19, 1965

FILED

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Honorable Cloy E. Whitney  
State Representative  
Room 201  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Whitney:

We have your opinion request of March 19, 1965, which reads as follows:

"Section 43.060 states, 'Patrolmen and radio personnel shall not be less than twenty-one years of age and shall not have reached their thirty-third birthday at the time of their appointment.' I request your opinion as to whether or not this section applies to the rehiring of a former member of the State Patrol as well as the employment of a new man."

From the facts stated in your letter, it appears that the men in question have at one time served in the Highway Patrol but have resigned from that position and retain no ties whatsoever with the Patrol. The question then becomes what is meant by the phrase "time of their appointment" as stated in Section 43.060, RSMo 1959.

It is our view that one who seeks to be rehired by the State Highway Patrol is in the same position as one making application for the first time. Thus, employment of such an individual would be an "appointment" within the meaning of Section 43.060 and, therefore, no such appointment could be made of an individual who has reached his thirty-third birthday.

We have inquired to ascertain the practices of the Highway Patrol regarding individuals who have previously served on the

Honorable Cloy E. Whitney

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Patrol, resigned, and later joined the Patrol again. It appears that such an individual is treated in exactly the same manner as is one who has never served before. His seniority commences on the date of the second appointment. He is obliged to undergo the same training as all other appointees and is no way treated differently than one who is serving under his first appointment. This, we believe, supports our conclusion that a second appointment to the Highway Patrol is an appointment within the meaning of Section 43.060 and the age qualification therein applies to such second appointment.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JJM:mje

August 16, 1965



Honorable Kenneth R. Babbitt  
Prosecuting Attorney Stone County  
Box 185  
Galena, Missouri

Dear Mr. Babbitt:

This letter is in answer to your request for an opinion of this office on the questions which you have stated as follows:

"Our public use areas in Stone County are owned by the Government, and the Government enters into leases with various persons for boat docks, and other commercial businesses within that use area. Under Sec. 12.080, it appears that the Government is to pay the state 75 per cent of all monies received from these leases. Sec. 12.070 indicates that 75 per cent of this money is to go to public schools, and 25 per cent for roads.

"Section 12.100 provides for the method in which the county court shall use these funds.

"Our problem is this.

"1. Does the county court distribute the money for the roads to the road districts in which these public use areas are located for them to use on the roads, or is the county to maintain the roads with this money itself.

Honorable Kenneth R. Babbitt

"2. Can this money be used only for the maintenance and improvement of that particular road leading to the public use area.

"3. Is the amount of money to be used on the roads to be based upon the amount of money the Government receives from the leases of each particular public use area, by the assessed valuation by the county assessor of the personal property of these commercial enterprises within the public use area, or by an evaluation of the amount of land within the public use area including the buildings, boat docks, etc."

We enclose a copy of the opinion of the Attorney General to J. S. Wallace, dated March 1, 1956, which bears on these topics.

Section 12.070 RSMo 1959, is concerned with national forest reservations in the State of Missouri. We understand that the situation involved in your inquiry does not pertain to forest reservations. The land owned by the United States in Stone County is under the Flood Control Act, considered in Section 12.080, RSMo 1959. By virtue of said Section 12.080 and Section 12.100, RSMo 1959, the moneys involved in your inquiry do not have to be allocated 75 per cent to public schools and 25 per cent for roads.

Section 12.080 RSMo 1959 states:

"All sums of money received from the United States, or any department thereof under an act of congress approved August 18, 1941, being an act providing for the payment to the several states of seventy-five per cent of all moneys received for leases of land situated in the various states to which the United States owns fee simple title under the Flood Control Act of May 15, 1928, as amended and supplemented (33 U.S.C.A. §701c-3,) to be expended as the general



Honorable Kenneth R. Babbitt

assembly may prescribe for the benefit of the public schools and public roads of the county in which the government land is situated, or for defraying any of the expenses of county government in the county, including public obligations of levee and drainage districts for flood control and drainage improvements, or as provided by any acts of congress authorizing the distribution of income or revenue from lands owned by the United State of America or any of its departments, bureaus or commissions or any agency of the United States of America, to states or counties or as provided by any amendments to those acts, shall be expended as the county court of the county entitled to receive the funds directs in accordance with the provisions and regulations provided by the acts of congress for distribution to states and counties."

Section 12.100 RSMo, provides:

"The county court of each county receiving any such moneys shall use the funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. The county court shall allow to the school districts and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of the moneys for defraying other expenses of the county."

Under these statutes, property owned by the United States in the county from which the United States has received rent,

Honorable Kenneth R. Babbitt

part of which has been paid to the State of Missouri under the Flood Control Act of the United States, should be evaluated as if it were privately owned and the hypothetical revenue which would have been received by school districts and the county for road purposes should be computed. The amount thus computed should be spent for schools and roads out of the money received by the county under Section 12.080, supra, before spending any such money on county purposes other than roads and schools. Any amount remaining over and above the amount so computed may be spent for county purposes in the discretion of the county court.

Neither the cited statutes nor any other statutes relating to county roads restrict the allocation of the funds involved. Therefore, the county court may in its discretion use these funds upon roads in the county.

Section 12.100 and Section 12.080 do not restrict the use of such money to the maintenance and improvement of the particular roads in or leading to the public use area.

In summary, and answering your questions directly, the county court may use that part of the money received which is to be devoted to maintenance and improvement of roads in its discretion upon the roads in such county. Further, such money may be used for any roads in the county, regardless of whether they are in or lead to the government land. Further, of such money received by the county, the county court should allocate to the school districts and for roads the amount based on their respective levies equal to that which would be allowed to them (i.e. the school districts and for roads) out of taxes from property owned by the United States if the property were privately owned.

Such amounts must be spent on schools and roads before using any of such money for other county purposes.

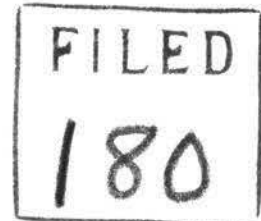
Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj

Enclosure

April 12, 1965



Mr. Thomas C. Gilstrap  
Secretary  
Missouri Boat Commission  
P. O. Box 603  
Jefferson City, Missouri

Dear Mr. Gilstrap:

This letter is in answer to your opinion request of March 29, 1965, regarding the Ski-Craft boat corporation of Seattle, Washington. Enclosed with your opinion request were various letters from one, John C. Stevenson, who is the General Manager of the Rotomotive Industries, Inc., who I assume produces the boat for the Ski-Craft corporation. There was a description of the boat and its uses also enclosed in a brochure. There seems to be two questions presented here: (1) Can this boat be operated on the lakes and rivers in Missouri without a ski mirror? (2) Can this boat be operated without an actual operator in the boat itself?

I feel you are, in effect, asking for a construction of Section 306.120, RSMo 1959. That section says in part:

"No person shall operate a vessel on any waters of this state for towing a person or persons on water skis, . . . unless there is in the vessel a person, in addition to the operator, in a position to observe the progress of the person or persons being towed, unless such vessel is equipped with a ski mirror \* \* \*".

I examined the letters from the Ski-Craft corporation and also their brochure. It seems they could add a mirror and be in compliance of that part of 306.120. Reading the statute, this would seem somewhat ridiculous, as the purpose of the mirror is for the operator of the boat to observe the skier; and in this instance here the operator of the boat

Mr. Thomas C. Gilstrap  
Secretary

is in fact, the skier. There is, however, the additional problem of not having an operator in the vessel. I do not see any way for them to comply with this section of our statute. I do not feel that we can in any way interpret the statute as meaning that the boat and the person operating it, who is being towed along behind on skis, are all one unit. This seems to be a situation where the legislature did not contemplate a vessel of the type offered by the Ski-Craft corporation. I feel that the only way the Ski-Craft corporation can rectify this situation is by the offering of legislation to either amend this section or add a new one that would specifically cover their type of vessel.

We have to, however, base our opinion on the strict construction of the statute and based on that, we do not see how a vessel of this type would, at this time, come under the present boating statutes that we have.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

BPS:df

April 30, 1965



Honorable John E. Downs  
Senator 34th District  
Capitol Building  
Jefferson City, Missouri

Dear Senator Downs:

This letter is in answer to your request for an opinion of this office on the question of whether the city council of a Constitutional Charter City has the authority to submit proposed amendments of the city charter to the city electorate at a municipal bond election.

Amendment of charters of Constitutional Charter Cities is governed by Article VI, § 20, of the Missouri Constitution:

"Amendments of any city charter adopted under the foregoing provisions may be submitted to the electors by a commission as provided for a complete charter. Amendments may also be proposed by the legislative body of the city or by petition of not less than ten per cent of the registered qualified electors of the city, filed with the body or official having charge of the city elections, setting forth the proposed amendment. The legislative body shall at once provide, by ordinance, that any amendment so proposed shall be



submitted to the electors at the next election held in the city not less than sixty days after its passage, or at a special election held as provided for a charter. Any amendment approved by a majority of the qualified electors voting thereon, shall become a part of the charter at the time and under the conditions fixed in the amendment; and sections or articles may be submitted separately or in the alternative and determined as provided for a complete charter." (Emphasis supplied).

Our problem is whether a municipal bond election is within the meaning of the word "election" that appears in the underlined language of the Constitutional provision.

The question is resolved in State ex rel. Miller v. O'Malley Mo.Sup., 117 S.W. 2d 319, wherein the Supreme Court of Missouri en banc stated at p. 322:

"But it is not true that wherever the word 'elections' appears in the Constitution it refers exclusively to the election of public officers by vote. Section 12, art. 10, Mo. St. Ann. Const. art. 10, § 12, limiting public indebtedness without the assent of two-thirds of the voters, has provided ever since 1875 for an election by the people on that question. Such elections are contemplated by the Constitution. Section 3, art. 8, has always begun with the words 'all elections by the people.' Many years ago these words were held to mean exactly what they say (save as to primary elections.) State ex rel. O'Connell v. Board of President and Directors of St. Louis Public Schools, 112 Mo. 213, 217, 218, 20 S.W. 484, 485. The very election

here involved was recognized by this court en banc as an election by the people in *Vrooman v. St. Louis*, 337 Mo. 933, 88 S.W. 2d 189. There can be no doubt about the fact that the section guarantees the secrecy of the ballot in bond elections, except as relaxed in the proviso."

In view of this decision we construe the language "next election held in the city" to include municipal bond elections. Therefore, the City Council has the authority to submit proposed charter amendments to the city electorate at a municipal bond election, provided the other requirements of Article VI, §20 of the Constitution are complied with.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj

June 9, 1965



Honorable James R. Hall  
Prosecuting Attorney Ripley County  
106 Court House Square  
Doniphan, Missouri 63935

Dear Mr. Hall:

This letter is in answer to your request for an opinion of this office on the question you have stated as follows:

"In 1935 or 1938 three Drainage Districts in Ripley County, which had been organized in County Court, ceased operation. These districts had been formed so that ditches could be constructed, and when the bonds for the ditches were paid, the districts no longer collected any taxes or performed any other operations.

"The question, in view of this background, is (1) What steps must be taken in order that the districts may again operate as districts; and (2) May the three districts combine to form one new district."

The three drainage districts involved in your question were organized pursuant to Chapter 243 RSMo. Districts organized under this chapter, that is, districts organized in County Courts, differ in several respects from drainage districts organized in Circuit Courts. Districts established by the County Court remain under the administrative control of that Court (not a board of supervisors), and

the County Treasurer acts as Treasurer of the district, Section 243.410 RSMo, and Section 243.240 RSMo; State ex rel. Drainage District No. 8 of Pemiscot County vs. Duncan, 334 Mo. 773, 68 S.W. 2d 679. The County Court has permanent management and control of such districts and makes and administers all improvements therein. The County Court manages County Court drainage districts under the statutes in the same manner as it manages the county's affairs. Drainage District No. 23 of New Madrid County v. Hetlage, 231 Mo. App. 355, 102 S.W. 2d 702.

The fact that the three districts involved in your inquiry have ceased all operations does not effect a dissolution. It was held in the case of State ex rel. Davidson v. Missouri State Life Insurance Company, 228 Mo. App. 38, 65 S.W. 2d 182, that the power to dissolve a drainage district originated by a county court lies solely with the Legislature. The Legislature has not enacted any legislation authorizing the dissolution of a district. Thus, these districts are still in existence.

These districts may be reactivated in one of two ways. The County Court may of its own volition under Section 243.330 levy a maintenance tax to take care of the drainage district.

If the County Court should fail to act on its own motion, and it develops that ditches or other improvements constructed in such district need to be enlarged, cleaned out, obstructions removed therefrom, or new work done, five or more of the owners of land originally assessed in a district may file a statement in writing with the County Clerk setting forth such necessity pursuant to Section 243.220 RSMo. The County Court will then proceed to follow the provisions of said Section 243.220 by directing the district engineer or an engineer of their selection to view the premises and report back to the Court in writing concerning necessary repairs and improvements and the probable cost of making such improvements as will restore such ditches, drains and levies to an efficient condition. The Court will then consider the report and if it approves the recommendations therein it will direct the engineer to make such repairs and improvements. Section 243.230 further provides for levying of additional taxes for such improvements.

Further, under Section 243.240, it is the duty of the County Court to maintain the efficiency of the drainage districts and the Court is vested with the continuous management and control thereof. Under that section, on a petition filed by a majority of the land owners owning the majority of acres of land in each district of such county, all of the drainage districts in a county may be treated and administered as a unit for the purpose of maintaining the ditches, drains and levies in all the districts.

In summary, the three drainage districts in Ripley County originally originated in the County Court, that have been inactive for many years, may resume operations by the voluntary action of the County Court pursuant to Section 243.330 or by the action of five or more of the owners of land originally assessed in each district desiring to resume operations and other procedure pursuant to Section 243.220; the three districts may combine as a unit for the purpose of maintaining ditches, drains and levies on a petition filed by a majority of land owners owning a majority of land in each district pursuant to Section 243.240, if these three constitute all of the Districts in the county.

Sections 243.450 to 243.470 provide for consolidation and reorganization of two or more adjoining drainage districts organized in County Court so as to become a district organized in Circuit Court. Under this procedure, the consolidated district would be administered by a board and would automatically dissolve after the expiration of the predetermined period of time, unless the time of corporate existence should be extended pursuant to the provisions of Section 242.130, RSMo.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj



April 19, 1965



Dr. George A. Ulett, Director  
Division of Mental Diseases  
722 Jefferson Street  
Jefferson City, Missouri

Dear Doctor Ulett:

This is in response to a recent inquiry initiated by Dr. Donald B. Peterson, Superintendent of the Fulton State Hospital. Dr. Peterson anticipates effecting the transfer of a federal prisoner from the federal institution at Springfield, Missouri, to the Fulton State Hospital for the reason that the patient is insane and would be best institutionalized at Fulton. It is my understanding that this federal prisoner is a resident of St. Louis County and, naturally, since Dr. Peterson recognizes that this person must go through the hospitalization commitment procedures under Section 202.807, referring to hospitalization by court order, the question is raised regarding the proper venue. I understand that it would be more feasible and expedient if the Callaway County Probate Court could properly handle the proceedings rather than initiate the matter in the probate court of the county of residence.

It appears that the question has already been answered for us in an Attorney General's Opinion, dated July 27, 1959, which was addressed to Dr. Addison M. Duval. As you will note from a copy of that Opinion which is enclosed, the pertinent question was as follows:

"What county has jurisdiction in the commitment of these cases we have here who were transferred from the Missouri State Prison, and whose sentences will expire when this law becomes effective, as well as future cases? Does the original county of residence have jurisdiction, or would the local county in which the hospital is located have jurisdiction?"

Dr. George A. Ulett

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You will note that the only dissimilarity between that question and the instant inquiry is that Dr. Duval's question referred to hospital inmates transferred from Missouri penal institutions whereas Dr. Peterson contemplates initiating hospitalization by court order of an inmate presently in a federal penal institution.

Comparing the two problems, I see no way of distinguishing the basic question and feel that the pertinent portion of the Conclusion of the Opinion that was sent to Dr. Duval in 1959 is applicable.

In either case, whether we contemplate that the prisoner is a federal prisoner and that his sentence will be commuted by the federal government or whether we hypothesize that the prisoner is receiving care and treatment as a patient in a Missouri state hospital and is to remain hospitalized at the termination of his sentence, the fact still remains that he can only be lawfully hospitalized at Fulton pursuant to specific requirements of Chapter 202. In this instance, of course, we are primarily concerned with hospitalization by court order and although the pertinent Section 202.807 does not specifically establish the venue, I note that Paragraph 1 of said Section uses the terminology "the court" and by comparison with the language of Section 202.805, RSMo 1959, Subsection 1, wherein it is stated that the head of the hospital shall notify "the probate court of the county of residence of such patient," it seems only logical that the legislative intent was to indicate that the proper proceedings be commenced at the probate court of the county of the patient's residence.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WAP:mac  
Enclosure

MUNICIPAL CORPORATIONS:

SECOND CLASS COUNTIES:

METROPOLITAN PLANNING COMMISSIONS:

CONTRACTS:

The City of St. Joseph and the County of Buchanan are authorized to create a Metropolitan Planning and Zoning Commission. Under the contract which has been executed by

these two political entities, whereby this Planning agency has been created, the agency is authorized to enter into appropriate contracts with State or Federal agencies without securing prior approval from the City of St. Joseph or the County of Buchanan.

August 6, 1965

OPINION NO. 186

Honorable John B. Mitchell  
Prosecuting Attorney  
Buchanan County  
St. Joseph, Missouri



Dear Sir:

This is in response to your opinion request of April 6, 1965, wherein you inquire as follows:

"May the Metropolitan Planning and Zoning Commission of Greater St. Joseph and Buchanan County enter into a Contract with any Federal or State Agency in the manner shown by the enclosed proposed contract with the State Highway Commission without approval of the County Court of Buchanan County or the Common Council of the City of St. Joseph?"

We note from the file that the City of St. Joseph, Missouri, and Buchanan County, have entered into a contract for the purpose of creating a planning commission known as the Metropolitan Planning Commission of Greater St. Joseph and Buchanan County, Missouri. This commission or agency was formed for the purpose of receiving Federal grants which are allocated to urban areas for projects based upon a comprehensive planning process. The agreement creating the planning agency is authorized by Section 70.220, RSMo 1959. This statute enacted pursuant to Article VI, Section 16, Constitution of Missouri 1945, reads in part as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the

Honorable John B. Mitchell

United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. \* \* \* "

This contract between these two political entities appears to be for a common service, namely, that of planning for the industrial and transportation needs of the areas within the two entities. Certain prerequisites must be met before such a contract is authorized. The subject and purposes of the contract must be within the scope of the powers of each municipality or political entity entering into the contract. In addition, the entity involved must be authorized to enter into a contract to cooperate in the performance of these services.

It appears that these prerequisites have been met by the City of St. Joseph and the County of Buchanan and these entities are legally empowered to enter into the contract here involved. Among other things, the contract creates a planning commission which will engage in intensive planning for the areas included in these two entities. St. Joseph, under Article XII of its Charter, is authorized to adopt provisions for city planning. The County Court of Buchanan County, a second class county, is authorized, after an affirmative vote of the people in accordance with Section 64.510, RSMo Cum. Supp. 1963, to provide for the preparation of a county plan.

The substance of your question appears to be whether the planning agency created by these two political entities can contract with still other agencies such as the State or Federal government or departments or agencies thereof. We believe that the answer to this question must be in the affirmative for the reasons hereafter indicated.

Both St. Joseph and Buchanan County are empowered by Section 70.220 to enter into contracts with the State or Federal government for planning grants. It is an elementary principle of law that a power given by statute carries with it, incidentally or by implication, powers not expressed but necessary to render effective the expressed power. Further, it is generally recognized that that which is implied in a statute is as much a part of it as the expressed powers therein.



Honorable John B. Mitchell

State ex rel Ferguson v. Donnell, 163 S.W.2d 940; Bowers v. Missouri Mutual Association, 62 S.W.2d 1058; Hudgins v. Mooresville Consolidated School District, 278 S.W. 769. If each contracting entity is by statute given the right to contract with the Federal government, certainly by necessary implication a commission or agency created by the joint action of the contracting entities acting pursuant to the same statute should have the same authority as possessed by each of its creators. Section 70.260 provides that the contract between the city and county may provide for a joint board and provide for the powers and duties of such joint board. The proposed contract which you have enclosed has granted authority to such joint board to cooperate with the State Highway Commission.

Since we have concluded that these two political entities are authorized to create the Planning agency and are further authorized to delegate to the Planning agency the authority to contract with State or Federal agencies, we must next look to the contract between the two entities to ascertain whether the two contracting political entities have reserved unto themselves the right to veto or require approval of contracts between the Planning agency and the State or Federal government. We do note that under Article IX, par. A, of the "Agreement" the contracting political subdivisions have expressly required that the Metropolitan Planning agency submit an annual budget to both of the contracting parties for approval, and the monies involved are paid over to the Planning agency only upon approval of their budget. Paragraph C of the same article provides that contracts may not be entered into without the approval of the city council and county court, if in the opinion of four or more of the commission members such a contract would limit, lessen, or expand the authority of the commission as set forth in this agreement. The proposed agreement which you inquire about is between the Planning commission and the State Highway Commission and we note that Article VIII of the "Agreement" between the two cooperating political subdivisions expressly authorizes the Planning commission to cooperate with the State Highway Commission.

It appears from your correspondence and the documents enclosed therein that the Planning commission is required to submit a budget to the two cooperating political subdivisions before receiving any money, and it appears that the contracting parties have authorized the Planning commission to expend the funds which have been appropriated as a result of the submission and approval of the annual budget of the Planning commission. It further appears that the contracting parties have not reserved unto themselves the right to veto these expenditures except under the circumstances already provided for in their "Agreement."



Honorable John B. Mitchell

CONCLUSION

It is the opinion of this office that the City of St. Joseph and the County of Buchanan are authorized to create a Metropolitan Planning and Zoning Commission. Under the contract which has been executed by these two political entities, whereby this Planning agency has been created, the agency is authorized to enter into appropriate contracts with State or Federal agencies without securing prior approval from the City of St. Joseph or the County of Buchanan.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

September 28, 1965



Honorable John C. Vaughn  
Comptroller and Budget Director  
State Capitol  
Jefferson City, Missouri

Dear Mr. Vaughn:

This office is in receipt of your letter, dated April 8, 1965, in which you state the following:

"Is it permissible under the laws of the state of Missouri for the State Comptroller to deduct monthly contributions to the United Community Fund from the pay checks of state employees who request such deductions? Also, I would like to know if the State Comptroller may refuse to make deductions from the pay checks of state employees for such deductions as this type."

The powers and duties of a state comptroller are dependent on the Constitution and statutes. 81 C.J.S. 990, States, sec. 66. In addition to the powers expressed by the statutes, the comptroller, as a public official, may have implied powers. The theory of implied power is stated in State vs. Wymore, 345 Mo. 169, 132 SW 2d 979, (1.c. 987):

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer . . . , he . . . has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers."

The first step in determining whether such deduction is permissible is to search the statutes and Constitution for applicable law. Article 4, sec. 22, of the Missouri Constitution, 1945, provides for the establishment of the budget and comptroller as a division of the Department of Revenue and enumerates the duties of that division. The Constitution contains no further reference to the Comptroller.

Honorable John C. Vaughn

Chapter 33, RSMo 1959\* and Cum. Supp., contains the statutes empowering and directing the comptroller in the performance of his duties. Section 33.103 authorizes the comptroller to deduct from an employee's compensation upon certain conditions and for certain purposes. That section states:

"Whenever the employees of any state department, division or agency establish any voluntary retirement plan, or participate in any group hospital service plan, medical service plan or other such plan, the state comptroller may deduct from such employees' compensation warrants the amount necessary for such employees' participation in the plan. Before such deductions are made, the person in charge of the department, division or agency, shall file with the state comptroller an authorization showing the names of participating employees, the amount to be deducted from each such employee's compensation, and the agent authorized to receive such deducted amounts. The amount deducted shall be paid to the authorized agent in the amount of the total deductions by a warrant issued as provided by law."

Such deduction must be voluntarily requested and must be for the purpose of allowing the employee to participate in a retirement plan, group hospital plan, medical service plan or other such plan.

A contributor to United Fund clearly does not come within the expressed provisions of Section 33.103. The only similarity between Section 33.103 and a contributor to United Fund is the voluntary nature of the act. This satisfies only one requirement of Section 33.103 and does not meet the remaining qualification as to purpose, i.e., retirement, hospital and medical services, or other such plans.

The only other sections authorizing the Comptroller to deduct, upon request, from an employee's compensation are Section 105.160 through Section 105.200. These sections allow such deduction for the purpose of obtaining U. S. savings bonds only. These sections are therefore clearly inapplicable.

With the exception of the statutes above discussed, the laws of Missouri are otherwise silent concerning deduction. There is neither expressed nor implied authority to allow the Comptroller to make the subject deduction.

\* Reference to statutes herein are to Revised Statutes of Mo., 1959, unless otherwise stated.

Honorable John C. Vaughn

Enclosed you will find an opinion of this office, dated March 25, 1965, issued to the Honorable Warren E. Hearnes, in which the problem of withholding money from the salaries of state employees is discussed. You will note particularly the paragraph on page 1 of the enclosed opinion which states:

"It is a settled rule of statutory construction that the state and its agencies are not to be considered as within the purview of a statute, unless an intention to include them is clear. This is especially so where prerogatives, rights, titles or interests of the state would be divested or diminished or liabilities and duties imposed upon it. *Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W. 2d 888."

While the subject of the enclosed opinion issued to Governor Hearnes deals with withholding earnings tax, what is said therein is applicable to the question you have posed. It should be noted that after this office issued the March 25, 1965, opinion, the 73rd General Assembly passed House Bill No. 703 which specifically authorized deduction of earnings taxes from payroll checks.

It is the opinion of this office that there is no authority which would allow the State Comptroller to withhold monthly contributions to the United Community Fund from the pay checks of state employees and such withholding would be unauthorized in the absence of a statutory provision so provided.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

WAP/jlf  
Enclosure

OFFICERS:  
SCHOOLS:  
BOARDS:  
CITIES, TOWNS,  
AND VILLAGES:  
CONFLICT OF INTEREST:  
PUBLIC OFFICERS:

A school board director is prohibited from participating in any contract or transaction in which he has a direct or indirect interest including the ownership of stock in a corporation doing business with the school board.

A school board of directors may deposit funds of the school district in a bank in which the president of the school board has such a small amount of stock that such ownership will not influence his judgment in behalf of the public interest and in which he is neither an officer or a director and where there is no bad faith or fraud.

August 5, 1965

OPINION NO. 193



Honorable Paul D. Hess, Jr.  
Prosecuting Attorney of Macon County  
Macon, Missouri.

Dear Mr. Hess:

Your letter of April 6, 1965, propounds the following question:

"A bank representative has solicited business from a six-director city school board of directors, of which the school board president is a minority shareholder (but neither a director nor officer) of said bank. Assuming lawful selection otherwise of said bank as a depository of some of such school district's funds, does the board president's interest in the bank prevent, as a matter contrary to public policy, the school district's having any contractual arrangements with said bank, or, may his said interest herein be regarded as indirect and also so remote as to permit such contractual arrangements?"

*A copy of opinion  
26-19616 should  
be sent with this  
opinion.*



It is apparent that there is a close question involved. The right of a school board to contract or do business with a firm in which a member has an interest is subject to close scrutiny.

The cases in Missouri which hold that a public officer may not profit from his official status are based on the theory that such transactions are against public policy. See *Witmer v. Nichols*, 8 S.W. 2d 63; *Smith v. Hendricks*, 136 S.W. 2d 449, and *Nodaway County v. Kidder*, 129 S.W. 2d 857.

In *State ex rel. Smith v. Bowman*, 184 Mo.App. 549, 170 S.W. 700, 702, in discussing "public policy" the Court said that, " \* \* \* the policy of the law is to favor fair and honest dealings \* \* \*."

The case of *Brawner v. Brawner*, Mo. 327 S.W. 2d 808, 812, states that:

"While a precise definition of the term public policy presents difficulty, it is generally said to be that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good; it is synonymous with the 'policy of the law' and 'the public good.' *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W. 2d 615, 620 (2). The definition and effect of the term is also extensively considered and discussed in *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120, 122 51 A.L.R. 877, certiorari denied 274 U.S. 745, 47 S.Ct. 591, 71 L.Ed. 1325."

Broadly, the determinative factor seems to be, is the private interest of the officer sufficient to influence his official judgment?

The case of *Githens v. Butler County*, 165 S.W. 2d 650, 652, presents an excellent discussion on this subject as follows:

"\* \* \* The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, § 1735, p.4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo.App. 549, 170 S.W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of [or] council. \* \* \* The fact that the interest of the offending officer in the invalid contract is indirect and is very small, is immaterial. \* \* \* It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, §773; 46 C.J., §308; 22 R.C.L., § 121; State ex rel. Streif v. White, Mo. App., 282 S.W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S.W. 2d 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857."

The law as expounded by the Supreme Court of Missouri has almost without exception frowned upon any business connection between a public official and the public interests he represents.

In *Witmer v. Nichols*, 8 S.W. 2d 63, 65, the Court said:

"\* \* \* But on either theory of fact the transactions, in so far as the school district was involved, contravened public policy. Nichols as a member of the board of directors owed the school district an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

In *Smith v. Hendricks*, Mo.App. 136 S.W. 2d 449, a member of the school board was paid for driving a school bus. Recovery was denied in such case because suit was instituted by private persons but the court held that the State, for and on behalf of the school district could recover the amount paid a school board member for such services.

A school district is a public corporation and a member of the school board of such school district occupies a fiduciary relationship to the district he represents, *State ex rel. Brickey v. Nolte*, 350 Mo. 842, 169 S.W. 2d 50, 55.

In *State ex rel. Smith v. Bowman*, 184 Mo.App. 549, 170 S.W. 700, the Court said:

"\* \* \* 'A public office is a public trust.' Like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law

in this respect is to remove from public officials, so far as possible, all temptation to use that official power directly or indirectly, to increase the emoluments of such office; and so they are forbidden to become interested in contracts let by them, or to have their salaries increased or decreased, or to accept offices created by themselves."

It is clear from the cases that "any direct or indirect interest in the subject matter" of the contract is sufficient to taint the transaction with illegality. Certainly the ownership of stock in a corporation is a direct interest in that corporation.

As said in *Githens v. Butler County*, cited above, it is impossible to lay down a general rule defining the interest of a public officer that would be sufficient to taint the transaction. Each case must be considered alone. But all such transactions must be closely scrutinized.

The courts will and should closely scrutinize all such transactions between school board members and corporations of which they are stockholders. There may be other facts not known to this office and not considered in this opinion which might influence the courts in consideration of this problem. For example, the terms offered by the bank or the financial condition or resources of the bank in comparison to the same factors offered by other institutions could be evidence that could affect the courts' examination and conclusion respecting this problem.

We have been informed that the school board president in the case presented here is the owner of 1.25% of the outstanding shares of stock in the bank in question. He is not an officer or director of the bank.

The problem here presented then is even though the school director's ownership of stock in the bank is a "direct" interest, yet should some "de minimus" rule apply to the transaction.

This rule, which stems from the legal maxim "de minimus non curat lex," literally means that the law does not concern itself with trifles.

For example, if the transaction involved the purchase by the school board of an automobile (General Motors make) and the school director owned one share of General Motors stock which have many millions of shares outstanding then it is not likely that the school director's judgment would be influenced by his ownership of one share of stock. But how many shares or what percentage of shares would be sufficient to influence his judgment respecting his public duties and his public trust? We are unable to find any cases which offer any guidance on this difficult problem. In one approach, it is a matter of conscience, of absolute integrity toward one's public trust. This office finds it impossible to lay down any positive rule to apply that would govern this borderline case.

If the school board president's interest in the bank is so small that it could not sway his judgment or indicate fraud, then that interest might be held to be so slight as to be almost non-existent and the de minimus rule would govern the situation.

#### CONCLUSION

It is the opinion of this office that:

1. A school board director is prohibited from participating in any contract or transaction in which he has a direct or indirect interest including the ownership of stock in a corporation doing business with the school board.

2. A school board of directors may deposit funds of the school district in a bank in which the president of the school board has such a small amount of stock that such ownership will not influence his judgment in behalf of the public interest and in which he is neither an officer or a director and where there is no bad faith or fraud.

This opinion which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,

*Norman H. Anderson*  
NORMAN H. ANDERSON  
Attorney General



PUBLIC ADMINISTRATORS: (1) Public Administrator-elect must  
BONDS: give bond before he is qualified to  
OFFICIAL BONDS: hold office. (2) Failure to give bond  
OFFICERS: within time prescribed does not auto-  
OFFICERS HOLDING OVER: matically vacate the office but may  
be ground to declare office vacant by  
legal procedure. (3) Until Public  
Administrator-elect or another be-  
comes qualified to hold the office,  
the incumbent Public Administrator  
continues to have the right to the  
office.

OPINION NO. 196

June 1, 1965

Honorable Robert B. Paden  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri



Dear Mr. Paden:

This official opinion is issued in response to your  
request of April 13, 1965. You inquire:

"In the event that the person elected  
to office as public administrator does  
not provide a bond approved by the Pro-  
bate Court on or before the first day  
of January following his election does  
the prior public administrator continue  
in office or may the elected public ad-  
ministrator qualify at some later date  
for the office?"

You have also advised that the public administrator-  
elect has been given the oath but has not yet filed a bond  
and that no estate has yet been opened to which any public  
administrator has been appointed.

Section 473.730, RSMo 1959, regarding public administra-  
tors states:

"Every county in this state, and the  
city of St. Louis, shall elect a public  
administrator at the general election  
in the year 1880, and every four years  
thereafter, who shall be ex officio

public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and such court may from time to time, as occasion shall require, demand additional security of such administrator, and in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

We shall consider your inquiry under three questions:  
1) Is giving a bond necessary before a public administrator-elect is qualified for his office? 2) What effect is the time requirement of Section 473.730? 3) Does the incumbent public administrator have the right to the office pending qualification of the administrator-elect?

I.

It is our opinion that the provision of Section 473.730 regarding giving bond is mandatory. Until bond is given a public administrator-elect is not fully qualified to hold office.

" \* \* \* the filing of an official bond is generally regarded as a necessary prerequisite to full title to an office, and is a condition precedent to the right of the person elected or appointed to be inducted into office, and without such bond one is not entitled to the

office and may not legally hold or discharge its functions. Thus a statute requiring an officer to make and file his bond before assuming the duties of his office has been held to be mandatory, "67 C.J.S., Officers, §39.

Although there appears to be some authority to the contrary, the courts of most states consider that a statutory provision that bond be given is mandatory.

In Sandrowski v. Sandrowski, Mo. App., 93 S.W. 2d 81, the court considered a statute providing that special commissioners in partition suits shall file a bond "before entering upon the discharge of the duties of his office." The court held the requirement to be "absolutely mandatory."

In re Bank of Mt. Moriah's Liquidation, Mo. App., 49 S.W. 2d 275, also involved a statute similar to Section 473.730. The statute there considered provided that a village treasurer shall "before he enters on the duties of his office, enter into bond." The court said, l.c. 277:

"It is quite apparent that section 7155 is merely directory and that Downey (the treasurer) was a de jure officer, although he gave no bond. In any event he was a de facto officer. . . . So far as third persons and the public are concerned there is no practical difference between the acts of a de jure and a de facto officer." (parenthesis added)

This case is seemingly contradictory to Sandrowski. However, we believe that the cases are distinguishable.

In the Mt. Moriah case the court was concerned with the rights of third parties arising from the acts of a public official who was fully qualified except for giving bond. The essential holding of the court was that so far as third parties were concerned, the official had at least de facto authority.

The Sandrowski case dealt more directly with the question of the qualification for office, which is the question we are here considering.

Whether the Mt. Moriah case be contrary or distinguishable, we are of the opinion that the Sandrowski rule should be applied here. That is, under Section 473.730 a public

Honorable Robert B. Paden -4-

administrator must give bond before he is fully qualified for office.

### III.

You inform us that your public administrator-elect did not give bond "on or before the first day of January." Thus, we must consider the effect of his failure to give bond within the time prescribed by Section 473.730.

Generally, where a requirement is made as to the time of filing an official bond, the time provision is considered merely directory. 42 Am. Jur., Public Officers, Section 124.

Mere delay in qualifying where a time is prescribed does not cause a vacancy in the office unless the statute expressly provides such an effect. State v. Heath, Mo., 132 S.W. 2d 1001, 1003. Section 473.730 does not contain any forfeiture provision for failure to give bond by January first.

In State ex rel. Attorney General v. Churchill, 41 Mo. 42, the court considered a statute providing that a county treasurer shall give bond within ten days after his election. The court said, l.c. 43: "This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office."

In State ex rel. Blankenship v. County Court of Texas County, 44 Mo. 230, the court held that failure to file a sufficient bond by a certain date did not work a forfeiture, but the officer could qualify by a later bond.

Therefore, where a public administrator-elect does not give bond on or before January first, he does not automatically forfeit his office but may qualify by giving bond thereafter. (However, since the giving of a bond is mandatory, the continued failure to give bond may be ground for declaring the office vacant by appropriate legal procedure. 42 Am. Jur., Public Officers, Section 135; 67 C.J.S., Officers, Section 41.)

### III.

You further inquire as to whether the prior public administrator will continue in office.

Section 105.010, RSMo 1959, provides:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Since the administrator-elect will not be qualified until he files the required bond, the incumbent public administrator continues to have the right to the office.

The incumbent's right will terminate upon qualification by the administrator-elect. Or if the administrator-elect should fail to qualify and the office be declared vacant by a court of competent jurisdiction, then the incumbent's right terminates upon qualification by the person filling the vacancy.

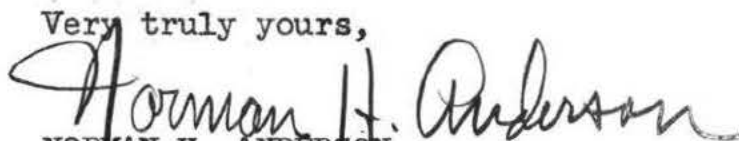
#### CONCLUSION

Therefore, it is the opinion of this office that:

- 1) Under the provisions of Section 473.730, RSMo 1959, a public administrator-elect must give bond before he will be qualified and entitled to hold office;
- 2) Failure to give bond within the time prescribed by Section 473.730 does not automatically vacate the office, however, continued failure to give bond may be ground for declaring the office vacant by appropriate legal procedures;
- 3) Until the public administrator-elect or another becomes qualified to hold the office, the incumbent public administrator continues to have the right to the office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



OPINION NO. 197

Answered by Letter (Eichhorst)

May 6, 1965

The Honorable Harry E. Hatcher  
State Senator, 28th District  
Room 331A, Capitol Building  
Jefferson City, Missouri



Dear Senator Hatcher:

This is in reply to your request for an opinion of this office inquiring as to the proper procedure to be followed where two candidates received a tie vote for the office of city marshal in a fourth class city.

Section 79.030, RSMo 1959, provides the manner in which the election for the elective officers of a city of the fourth class shall be held. This section reads as follows:

"A general election for the elective officers of each city of the fourth class shall be held on the first Tuesday in April next after the organization of such city under the provisions of this chapter, and every two years thereafter; and all city elections shall be held under the provisions of Chapter 111, RSMo, excepting the provisions of section 111.280, and except that the judges of election in such city election shall perform all the duties of both the judges of election and clerks of election as prescribed in the state election laws, unless the city council shall provide for such clerks of election by ordinance. All duties specified in the state election laws to be performed by the constable or sheriff shall be performed by the city marshal in the city elections; and all duties specified in the state election laws to be performed by the county clerk shall be performed by the city clerk in the city elections. The polling places for all elections in cities of the fourth class and the judges therefor shall be selected and specified by the respective

boards of aldermen of such cities by resolution, ordinance or otherwise. The manner of making returns of such elections shall be prescribed by ordinance; provided, that city organizing under the provisions of this chapter may elect a mayor and such other officers as may be necessary to carry this chapter into effect, who shall hold office until the first Tuesday in April thereafter and until their successors are elected and qualified."

One of the Sections of Chapter 111, RSMo, incorporated by reference in Section 79.030, RSMo 1959, which is applicable to cities of the fourth class is Section 111.760, RSMo 1959, which pertains to the procedure where there is a tie vote for all offices not otherwise provided for by law. Since there is no statute relating to a tie vote for city marshal in a fourth class city, this Section is applicable to tie votes for the office of city marshal. This Section is as follows:

"If there shall be a tie of the votes given for any two of the candidates, except in cases otherwise provided by law, the clerk and his assistants appointed pursuant to section 111.710 casting up the number of votes, or a majority of them, shall issue their order to the sheriff of the county where the same may occur, directing him to issue his proclamation for holding an election agreeably to the provisions of this chapter; and in all cases of such special election, the clerk and assistants, or a majority of them, when they issue the order to the sheriff, shall, in such order, state the day on which such election shall be held, giving reasonable time for the same to be promulgated."

It is to be noted that Section 111.625, RSMo 1959, provides that certain provisions of Chapter 111 do not apply to fourth class city elections; Section 111.760, RSMo, is not included therein and thus, is applicable.

Thus, as provided in Section 79.030, the provisions of Section 111.760 shall be performed by the substituted officials designated in Section 79.030.

In addition, Section 79.030, RSMo 1959, provides in part that the "manner of making returns of such elections shall be prescribed by ordinance . . ." Thus, the body that casts up the votes in such

Honorable Harry E. Hatcher     -3-

City election under ordinance is the proper body to call the elections.

Attached is a copy of an opinion to The Honorable F. Neil Aschemeyer, dated April 7, 1960, relating to the election duties of city marshals in cities of the fourth class.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure

TEE:mac

June 9, 1965



Honorable Frank Conley  
Prosecuting Attorney of Boone County  
Court House  
Columbia, Missouri

Dear Frank:

Your inquiry (as restated by this office) whether the county court may pay from the county treasury salaries for stenographic assistance in excess of \$1200.00 (as limited by Section 53.095, V.A.M.S.) where such services are required by the county assessor to prepare notices of increased valuations and/or assessments pursuant to Section 137.138, V.A.M.S. and citing subparagraph 2, Section 137.230, V.A.M.S. has been carefully considered by this office.

Section 137.230, V.A.M.S. when reduced to its effective minimum terms is interpreted by this office to read as follows:

2. "In all counties the county court may, in addition to the foregoing provisions for securing a full and accurate assessment \* \* \* or in lieu thereof, by order \* \* \*, adopt \* \* \* any other suitable and efficient means or method \* \* \* whether by procuring maps, plats or abstracts of titles \* \* \* and may require the assessor \* \* \* to carry out the same and may provide the means for paying therefor out of the county treasury."

The legislature has by this statute created a "means or method" that the county court may employ, in its discretion, to discover property in the county which has escaped its fair

share of taxation. It is limited to being a discovery device the court may employ to attain a specific goal, viz, the location of untaxed property. When the means or method has for its purpose this declared object, then the county court is authorized to expend additional monies from the county treasury for that limited purpose only.

Consideration of the case law sustains this posture of the office on this statute. In an earlier statute involving the predecessor of the present Section 137.230, V.A.M.S. was considered in the case of State ex rel and to Use of Tadlock v. Mooneyham, 212 Mo. App. 573, 253 S.W. 1098 and the Court set out the statute:

Section 12797. "Nothing in the preceding five sections shall be construed to apply to counties which have already adopted a method of plats and abstracts to facilitate the assessment and collection of the revenue; nor shall the provisions of the preceding five sections apply to counties having a less population than forty thousand, unless a majority of the voters in any such county shall elect to adopt its provisions at a general election upon the question being ordered to be submitted by the county court: Provided, that in counties having a population of over forty thousand the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable for taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of such county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in such county or designated part thereof or otherwise, and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury."

"\* \* \* The Legislature evidently understood that in the larger counties the opportunity for concealing wealth from taxation would be much greater than in the smaller counties, and they evidently intended by the provisions of the statute aforesaid to put it in the power of the county court in those counties to ferret out property that was being withheld from assessment and place it upon the tax books of the county, so that it should bear its proportion of the burdens of taxation."



This interpretation was later affirmed in *Hellman v. St. Louis County, Mo.*, 302 S.W.2d 911 when the court cited Section 137.230 and held, l.c. 915, 916:

"More directly bearing upon the precise question here involved is Section 137.230 of the statutes, the pertinent portion of which reads: '\* \* \* provided, that in counties having a population of over forty thousand the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of such county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in such county or designated part thereof or otherwise, and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury.

"[3,4] That provision was considered at length by the Springfield Court of Appeals in *State ex rel. and to use of Tadlock v. Mooneyham*, 212 Mo.App. 573, 253 S.W. 1098, and was held to be an express grant of power for the purposes therein stated. It seems clearly to authorize contracts such as are here involved. But, in any event, it definitely amounts to a declaration of public policy that the county courts of counties of more than 40,000 population may adopt suitable and efficient means or agencies to procure an accurate assessment of all or any portion of taxable property in their counties and pay for such services out of the county treasury. \* \* \*" (Emphasis supplied)

Thus, the courts have held that the purpose of Section 137.230, V.A.M.S. is to furnish a means or method to "ferret out" taxable property which may have escaped its legitimate burden of taxation. Of course, all such necessary expenses and costs incident to such means or methods but limited to that purpose are payable from the county treasury.

In your specific case, however, there is an apparent difference between the clear object of Section 137.230 and what is here to be done by the county court. In the instant case, the county court desires to make an additional grant to send out notices required by statute. The property has been discovered, so to speak, and the county court now desires to

expend funds from the county treasury, apparently in excess of \$1200.00 per annum as authorized by Section 53.095, V.A.M.S., to notify property owners of the increased valuations and/or assessments pursuant to Section 137.138 V.A.M.S.

A plain reading of Section 53.095 V.A.M.S. places the statutory limit on the amount which the county court may authorize for payment from the county treasury of clerical and/or stenographic assistance in the assessor's office. As a third class county, Boone County has a maximum limit of \$1200.00 per annum.

Section 53.095, V.A.M.S. was first enacted in 1951; later amended by law 1959, H.B.87 §1. This office believes it should be read:

"The county assessor (in a third class county) may appoint and fix the compensation of such clerical and stenographic assistants \* \* \*. The compensation \* \* \* shall be paid from the county treasury subject to approval of the county court and shall not exceed \$1200 per annum in counties of class three \* \* \*."

The words "shall not" are words of limitation. In construing those words and applying Sec. 1.090, V.A.M.S. to the effect that words and phrases shall be taken in their plain or ordinary and usual sense, one is compelled to accept the proposition the county court may only grant a sum from the county treasury not in excess of \$1200 per annum for clerical or stenographic assistance in the office of the assessor. Indeed, a clear conflict would result if any other interpretation were applied. As was said by the Supreme Court in *State ex rel. St. Louis Die Casting Corp. v. Morris* (1949), 358 Mo. 1170, 219 S.W.2d 359, 362:

"It has been said many times it is elementary in construing statutes that, if possible, effect must be given to every word, clause, sentence, paragraph, and section of a statute so that one section, or part, will not contradict, conflict with or destroy another; and it is presumed the legislature intended every part and section of a law to have effect and be operative. *Graves v. Little Tarkio Drainage Dist.* No. 1, 345 Mo. 557, 569, 134 S.W.2d 70, 78 [9, 11]; *State ex rel. Dean v. Davies*, 321 Mo. 1126, 1151, 14 S.W.2d 990, 1002; *Castilo v. State Highway Comm.*, 312 Mo. 244, 279 S.W. 673, 676 [4, 5]; *State ex rel. and to use of Public Service Comm. v. Padberg*, 346 Mo. 1133, 145 S.W.2d 150, 151 [5]."

Any other construction than that presented above would create a direct conflict. The interpretation herewith suggested is not only harmonious but reasonable in the opinion of this office.

Prior to 1951, the payment of assessors and assistance to include clerical assistance was accomplished by fees charged and collected. The Supreme Court en banc in *Buder v. Hackmann*, 305 Mo. 342, 265 S.W. 532, stated that:

"The main controversy centers around relator's (assessor's) claim for clerk hire, \* \* \*. Section 13124 provides assessors (of St. Louis) shall be compensated in like manner \* \* \*, and is fixed by Section 12816, as amended by Laws 1921, page 671.

"\* \* \* Section 13124 provides that assessors shall be compensated in like manner and in like amounts as for assessment of other taxes. Their compensation for assessment of other taxes is fixed by section 12816, as amended by Laws of 1921, p. 671. Such compensation is in lieu of salary, except where a salary is provided by law. In that case the salary provided for is in lieu of fees. Section 12762 provides that the assessor may appoint as many deputies as he needs, 'to be paid out of the fees allowed to such assessor.' It is therefore the plain purpose of the statute, where the assessor is compensated upon the fee basis, that he shall pay out of such fees all of the salaries of deputies (including clerks) in making such assessments. Section 13124 provides that he shall be compensated in the same manner for making and receiving income tax returns. There is therefore no escape from the conclusion that the assessor must pay salaries of all necessary deputies and clerks out of the fees allowed him for taking and receiving income tax returns. The 'actual necessary expenses' provided for do not include salaries of any character. The clear meaning of sections 13116 and 13124 is that the assessor, in addition to the fees allowed by law, shall be entitled to have furnished to him, without deduction from such fees, all his necessary printing, stationery, postage, and office equipment, and that he shall be reimbursed for all outlays made by himself and his deputies by way of expenses in doing the work, for the doing of which work he and they are fully paid out of the fees allowed by law.

"[2, 3] Before the state can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment. *Williams v. Chariton County*, 85 Mo. 645; *State ex rel. v. Wilder*,

197 Mo. loc. cit. 32, 94 S.W. 499; Sanderson v. Pike Co., 195 Mo. loc. cit. 605, 93 S.W. 942 \* \* \*."

"\* \* \* The argument of hardship, and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. State ex rel. v. Brown, 146 Mo. loc. cit. 406, 47 S.W. 504. It may be that an assessor actually sustains a financial loss in the performance of his duties under our state Income Tax Law. But such fact is for consideration by the Legislature and not by the courts. In view of what we regard as the plain provision of the statute that clerk or deputy hire shall be paid by the assessor out of the fees received by him, the cases of Ewing v. Vernon Co., 216 Mo. 681, 116 S.W. 518, and Harkreader v. Vernon Co., 216 Mo. 696, 116 S.W. 523, cited and relied upon by relator, need not be discussed."

In 1951, the present Section 53.095 was enacted (as amended by Law 1959, H.B. 87, Section 1) to provide for clerical and stenographic assistance and as stated in the Buder case:

"[2,3] Before the state can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment. \* \* \*"

None exists authorizing payment of monies from the county treasurer in excess of \$1200.00 in the opinion of this Office.

While it is apparent there may be expenses incurred by the county assessor of Boone County for stenographic assistance in excess of that allowed by statute "failure to provide the salary or fee for a duty imposed upon an officer by law does not excuse his performance of duty." The fact (of such loss falling upon the assessor) is for the consideration by the legislature and not by the courts (Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532).

#### CONCLUSION

(1) It is the opinion of this Office that the maximum amount that the county court may pay from the county treasury for salaries of clerical and stenographic assistance cannot exceed the sum of \$600.00 in fourth-class counties and \$1200.00 in third-class counties.

(2) Section 137.230, V.A.M.S. furnishes a "means or method" whereby counties may employ appropriate persons or agencies to ferret out taxable property which may have escaped legitimate taxation by remapping, replatting or similar means. All necessary expenses (whether under contract or not) incident but limited to this purpose including stenographic assistance may be paid from the county treasury.

(3) Notwithstanding the requirement of Section 137.230 that the county assessor notify real estate owners of increased valuation and/or assessment in writing, such statutory obligation does not allow the county court to pay from the county treasury a sum in excess of \$1200.00 for clerical and/or stenographic help in the assessor's office of third-class counties even though the county assessor may incur expenses for clerical and/or stenographic assistance in excess of that amount.

The foregoing opinion, which I hereby approve, was prepared by my assistant, R. C. Ashby.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

RCA:lvd

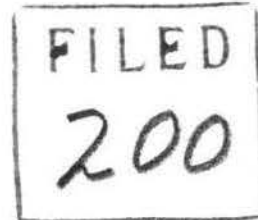


INSURANCE: A life insurance company cannot accept the pro-  
CORPORATIONS: visions of the General and Business Corporations  
Act.

Opinion No. 200

July 15, 1965

Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your letter of April 16, 1965,  
wherein you requested an opinion from this office as follows:

"This is to courteously request the  
opinion of your office as to whether  
or not a life insurance company formed  
under the insurance laws of the State  
of Missouri may properly accept Chapter  
351, R. S. Mo., 1959, \* \* \*"

This question arises by reason of documents received in  
your office on behalf of National Home Life Assurance Company  
which include an amendment to the Articles of Incorporation  
adopted by the Board of Directors and Stockholders as follows:

"RESOLVED: That this company accept  
the general and business corporation  
law of Missouri, being Chapter 351 of  
Revised Statutes of the State of  
Missouri, 1959 as amended."

Chapter 351 is the General and Business Corporations Act. Sec-  
tion 351.025 provides as follows:

"Any existing corporation heretofore  
organized for profit under any special  
law of this state may accept the pro-  
visions of this chapter and be entitled  
to all of the rights, privileges and

benefits provided by this chapter, as well as accepting the obligations and duties imposed by this chapter, by filing with the secretary of state a certificate of acceptance of this chapter, signed by its president and secretary, duly authorized by its board of directors, and approved by the affirmative vote of a majority of its outstanding shares."

Article XI, Section 2, Constitution of 1945, prohibits the creation of a corporation by special law. A similar prohibition was contained in the Constitution of 1875, Article XII, Section 2 and in the Constitution of 1865, Article VIII, Section 4. Prior to the adoption of the Constitution of 1865, apparently it was common practice for the Legislature to grant corporate charters by special acts. Thus, prior to 1865, apparently most, if not all, of the corporations in the State came into existence by special acts of the Legislature. The provision of Section 351.025 for existing corporations organized for profit under any special law of this State to accept the provisions of Chapter 351 applies only to corporations chartered by special acts of the Legislature as discussed above.

It is assumed that National Home Life Assurance Company was not incorporated by a special act of the Legislature. It is further assumed that this company was incorporated pursuant to Chapter 376, RSMo 1959. Insurance companies are not permitted to organize under Chapter 351 pursuant to Section 351.020 as follows:

"Corporations for profit except banking, insurance, railroad corporations, building and loan associations, savings banks

and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies and exposition companies may be organized under this chapter for any lawful purpose or purposes."

Furthermore, Section 351.690 specifically limits the applicability of Chapter 351 as follows:

"The provisions of this chapter shall be applicable to existing corporations as follows:

"(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;

"(2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations;"

To summarize, Section 351.025 permits all corporations organized for profit under special laws to accept the provisions of the General and Business Corporations Act; insurance companies for profit are not permitted to organize under the act pursuant to Section 351.020; and no provisions of the act are applicable to insurance companies under Section 351.690 except to the limited extent, if any, in regard to reports, registration statements, antitrust affidavits and taxes and fees as referred to in paragraph (1) thereof. Therefore, if National Home Life Assurance

Company had been incorporated by a special act of the Legislature (we have assumed it was not so incorporated), it could not accept the provisions of Chapter 351 because, Section 351.025 notwithstanding, other provisions of the Chapter specifically exclude its applicability to insurance companies; State ex rel. City of Kirkwood v. Smith, 210 S. W. 2d 46, 1. c. 48.

CONCLUSION

It is the opinion of this office that a life insurance company formed under Chapter 376 RSMo cannot accept the provisions of Chapter 351 RSMo pursuant to Section 351.025.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

WITNESSES:  
PROSECUTING WITNESSES:  
PROSECUTING ATTORNEYS:  
NOLLE PROSEQUI:

A prosecuting witness cannot nolle  
prosequi a criminal case. Same is  
the exclusive prerogative of the  
prosecuting attorney.

OPINION NO. 201

May 24, 1965

Honorable Allen S. Parish  
Prosecuting Attorney  
Saline County Court House  
Marshall, Missouri 65340



Dear Mr. Parish:

This is in response to your request for an opinion as follows:

"Does the prosecuting witness or complainant who has signed the complaint in a felony (under Section 544.020, R.S.Mo., 1959, and Supreme Court Rule 21.08) or misdemeanor case have the power to withdraw the complaint at any stage of the proceedings, either before or after an information has been filed, or does the Prosecuting Attorney have the exclusive power whether or not to enter a nolle prosequi?"

The general principle is that he may not, 22 C.J.S. 813, § 315, because it is really the public interest which is at stake.

A prosecuting witness need not necessarily be the victim of a particular crime. He may be anyone having knowledge thereof, such as a deputy sheriff (State v. Frazier, 98 S.W. 2d 707) or the prosecuting attorney himself (State on inf. McKittrick v. Wymore, 132 S.W. 2d 979) and, incidentally, the knowledge need not be first hand, State v. Layton, 58 S.W. 2d 454.

Thus, even if a victim were to try to thwart prosecution by either declining to sign a complaint or attempting to withdraw one already filed, he could not do so because it would then be a simple matter for a law enforcement official or the prosecuting



attorney to make the complaint on such knowledge as he may have, see State v. Herron, 376 S.W. 2d 192, and Attorney General's Opinion to Hon. W. H. Pinnell, #71, 1954 (copy attached).

Once the crime has come to light, it is the prosecuting attorney who has complete charge, or, as was stated, in State ex rel. Dowd v. Nangle, 276 S.W. 2d 135, 138:

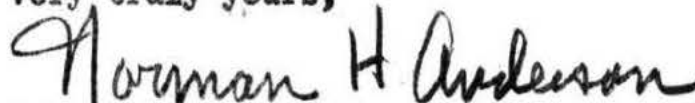
" : \* \* \* It is clearly the weight of authority that if there is no statute respecting the right to enter a nolle prosequi (and there is no such statute in Missouri) that such right lies within the sole discretion of the prosecuting attorney." (Emphasis the court's)

#### CONCLUSION

A prosecuting witness cannot nolle prosequi a criminal case. Same is the exclusive prerogative of the prosecuting attorney.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Howard L. McFadden.

Very truly yours,



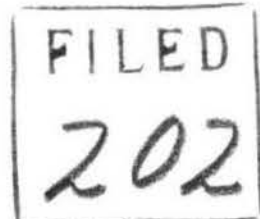
NORMAN H. ANDERSON  
Attorney General

Enclosure

CONSTITUTIONAL LAW: In any bill containing an emergency  
GOVERNOR: clause, the Governor is powerless  
VETO: to veto the emergency clause only.

OPINION NO. 202

May 24, 1965



Mr. Eugene P. Walsh  
Legal Assistant to the Governor  
Executive Office  
Jefferson City, Missouri

Dear Mr. Walsh:

This letter is in answer to your request for an opinion of this office on the question of whether or not the Governor has the right to veto an emergency clause in a bill passed by the General Assembly, and still approve the bill itself.

We enclose a copy of the opinion of the Attorney General to Elmer L. Pigg, dated January 21, 1953. That opinion sets out the applicable principles of law and holds that an attempted veto by the Governor without Constitutional authority is a nullity.

The applicable constitutional provisions are Sections 29 and 31 of Article III, and Section 26, of Article IV, Constitution of Missouri, 1945.

Article III, Section 29, *supra*, states:

" No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if

the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Article III, Section 31 states:

"All bills and joint resolutions passed by both houses shall be presented to and considered by the governor, and within fifteen days after presentation he shall return them to the house of their origin endorsed with his approval or accompanied by his objections. If the bill be approved by the governor it shall become a law. When the General Assembly adjourns, or recesses for a period of thirty days or more, the governor may return within forty-five days any bill or resolution to the office of the secretary of state with his approval or reasons for disapproval."

Article IV, Section 26 of the Constitution provides for the item veto with respect to appropriation bills. It provides in part as follows:

"The governor may object to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill.\* \* \*"

Hence, the item veto is not applicable to other bills.

The applicable principle concerning the power of the Governor to veto legislation is stated in 82 C.J.S. Statute, Section 52, page 85, as follows:

"\* \* \* The authority of an executive to set aside an enactment of the

legislative department is not an inherent power, and can be exercised only when sanctioned by a constitutional provision, and only in the manner and mode prescribed. The executive's veto power is a power conditionally to prevent legislation, but is not the power to enact new laws or to recall or modify old laws. The veto power is in derogation of the general plan of the state government, and provisions authorizing it must be strictly construed, so as to limit its exercise to the powers expressly enumerated or necessarily implied. \* \* \*

This language is quoted with approval by the Supreme Court of Missouri en Banc in *Brown v. Morris*, 290 S.W. 2d 160, 168, 169.

Article III, Section 31 authorizes the Governor to veto bills passed by the legislature. Neither Section 29 nor Section 31 of Article III makes any provision which would authorize the Governor to veto an emergency clause only. Section 26 of Article IV authorizes the Governor to exercise the item veto with respect to appropriation bills. Applying the principle that the exercise of the veto power by the Governor must be in strict accord with the authority granted by the Constitution, it must be concluded that the Governor is without power to veto an emergency clause alone while approving a bill passed by the legislature.

#### CONCLUSION

It is the opinion of this office that the Governor is without power to veto an emergency clause only and approve the bill.

Mr. Eugene P. Walsh

-4-

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald L. Randolph.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure



JAILS AND JAILERS: Expense of jailkeeper of third or fourth class  
PRISONERS county for boarding prisoners from another county  
COUNTIES: is limited to actual and necessary costs.  
CRIMINAL COSTS:

County committing prisoner is not legally liable for damage caused by prisoner to the property of the county where the prisoner is held in jail.

OPINION NO. 203

May 13, 1965

Honorable J. R. Fritz  
Prosecuting Attorney  
Pettis County  
Sedalia, Missouri



Dear Mr. Fritz:

This is in response to your opinion request of April 19, 1965, which inquires as follows:

"May I please have your opinion under Section 221.230 as to the method or basis of determining the amount of compensation to be paid by one county to another for the keeping of a prisoner.

"Would such compensation be based on the actual cost incurred or may it be some arbitrary fee greater than such actual cost, and if so, who may determine the amount in reasonableness of such fee.

"Also, under the same statute, what financial responsibility would there be upon Pettis County in the event a Pettis county prisoner in custody in the jail of another county caused damage to the property of such other county."

The Section cited in your first question, Section 221.230, RSMo 1959, states:

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said

county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

This Section makes it lawful for a sheriff of any county to commit persons to the nearest jail of some other county and also imposes upon the sheriff or keeper of the jail of the other county the duty to receive the committed person. This Section does not set out the manner of payment or the method of determining the amount to be paid for the board of such person.

The manner of payment of the expenses incurred by the commitment of a person in another county is provided by Section 221.260, RSMo 1959, which states:

"In all cases where a person is committed from another county for a criminal offense under this chapter, such county, or the prisoner, or the state, shall pay the expenses, in the same manner as if the commitment had been in the county where the offense was committed; and in civil suits, the plaintiff or defendant, or the prisoner, shall pay the expenses, in the same manner as if the imprisonment had taken place in the county where the suit commenced."

Section 221.090, paragraph 1, which follows, provides the means of determining the cost of boarding prisoners in Class 3 or 4 counties, which contain the nearest jails to Pettis County:

"1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost." [Emphasis ours.]

The method of ascertaining costs of boarding prisoners has therefore been legislatively determined and may not be an arbitrary figure.

For your further clarification, I am enclosing copies of opinions issued by this office, each of which are relative to Section 221.090, and are as follows: (1) to Alden S. Lance, dated October 12, 1964; (2) to John Hosmer, dated December 20, 1954; and (3) to D. R. Jennings, dated March 10, 1952.

The answer to your first question is that Section 221.090 provides the method of determining the amount to be paid for the boarding of prisoners in the jail of another county in counties of the third and fourth class.

In answer to the second part of your inquiry, Section 221.230 does not impose any liability upon Pettis County for the tortious acts of a Pettis County prisoner confined in the jail of another county. A county is immune from tort liability inasmuch as it is formed for the sole purpose of exercising purely governmental powers and is not liable in damages for either non-exercise or improper exercise of such powers by persons charged with the execution thereof, in the absence of a statute expressly imposing such liability. Such was the rule of Cullor v. Jackson Tp., Putnam County, 249 S.W. 2d 393. This rule was reiterated in 1963 by the Supreme Court of Missouri in Lloyd v. Garren, 366 S.W. 2d 341, 1.c. 346, thus:

"While the County of Wayne, as such, is not named a party to this suit it is clear that a judgment for damages against the defendants in their official capacities as the judges of the County Court of Wayne County would have no efficacy or purpose unless it be to place plaintiffs in position to obtain money for damages from the treasury of Wayne County. If Wayne County had been sued as a party for damages for its act of having the fence torn down there could have been no judgment for damages rendered against it because of its immunity from tort liability as a subdivision of the state. See, Cullor v. Jackson Tp., Putnam County, Mo., 249 S.W. 2d 393; State ex rel. State Park Bd. v. Tate, 365 Mo. 1213, 295 S.W. 2d 167, 59 A.L.R. 2d 933; Reed v. Howell County, 125 Mo. 58, 28 S.W. 177. The immunity from tort liability of the county as a subdivision of the state necessarily extends to the members of the county court when sued solely in their representative capacities. See Gas Service Co. v. Morris, Mo. 353 S.W. 2d 645."

Although Section 221.260, *supra*, indicates the possible liability of the transmitting county for the costs of commitment and

uses the language "shall pay the expenses," it cannot be logically concluded that the said county is subjected to any legal liability for the acts of a prisoner causing damage to the property of the county where the prisoner is held in jail. Such items of damage are chargeable solely to the tortfeasor and are not dependent upon the cause for which he is confined.

CONCLUSION

It is the opinion of this office that the expenses of a sheriff or jailkeeper of another county of the third or fourth class for the boarding of prisoners from Pettis County pursuant to Section 221.230, RSMo 1959, may not be arbitrary and must be in conformance to the express provisions of Section 221.090, RSMo 1959, which limits such expenses to the actual and necessary costs incurred.

It is further the opinion of this office that Pettis County has no legal responsibility for damage caused by the tortious acts of a prisoner from Pettis County confined in a jail of another county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Enclosures (3)

SCHOOLS: School boards have the authority to employ  
SCHOOL DISTRICTS: personnel for the purpose of providing for  
SCHOOL BOARDS: the safety and discipline of pupils while on  
streets proximate to the school premises during  
times proximate to school activities.

OPINION NO. 207

October 5, 1965

Honorable James Godfrey  
State Representative  
418 Olive Street  
St. Louis, Missouri



Dear Representative Godfrey:

This official opinion is issued in response to your request for a ruling. You inquire:

"Whether or not it is legal for a school district to use money from the incidental fund to compensate guards for escorting and assisting school children to cross streets and highways while going to and from school."

It is a time-honored legal principle that school boards are creatures of statute and accordingly have only such powers as are expressly conferred by law or as are necessarily implied from the express powers. Wright v. Board of Education, Mo., 246 S.W. 43, 45.

Where a school board has a delegable power it is necessarily implicit in the power that the board may employ personnel essential to the implementing of the power. For example: Where a board has authority to provide transportation, it has authority to employ bus drivers; a board has authority to provide lunches, thus it has authority to employ cafeteria personnel; the board is charged with the control and preservation of school buildings, thus it may employ custodians.

Thus, whether or not a school board has the power to employ personnel to provide for the safety and discipline of pupils while crossing streets en route to and from school, depends upon whether or not the school board has the authority to control or govern pupils at such times and places.



Honorable James E. Godfrey

By statute, school boards are empowered to "make all needful rules and regulations for the organization, grading and government in the school district." Section 171.011, RSMo. Supp. 1963 Appendix.

This power has been frequently construed by the courts as extending beyond school premises and school hours. 79 C.J.S., Schools and School Districts, Section 496; 47 Am.Jur., Schools, Sections 172, 173, 186; Anno. 41 A.L.R. 1312.

School authorities, are considered loco parentis while pupils are within their domain.

" \* \* \* The teacher of a school as to the children of his school, while under his care, occupies for the time being the position of parent or guardian, and it is his right and duty not only to enforce discipline to preserve order and to teach, but also to look after the morals, the health and the safety of his pupils; to do and require his pupils to do whatever is reasonably necessary to preserve and conserve all these interests, when not in conflict with the primary purposes of the school or opposed to law or a rule of the school board. . . ." (l.c. 230.)

" \* \* \* the jurisdiction of the school board to make needful rules for the conduct of the pupils and of the teacher to enforce such rules, is not confined to the school room and school premises, but extends over the pupil on his road from his home to school and return. . . ." State ex rel. v. Randall, 79 Mo.App. 226, l.c. 229.

In Deskins v. Gose, 85 Mo. 485, a school rule forbidding quarreling or use of profane language at and on the way to and from school was in issue. The violation occurred about one-half mile from the schoolhouse. The court upheld the rule, saying, l.c. 488:

" \* \* \* If the effect of acts done out of the school room while the pupils are returning to their homes, and before parental control is resumed, reach within the school room, and are detrimental to good order and the best interests of the school, no good reason is perceived why such acts may not be forbidden, and punishment inflicted on those who commit them. . . ."

Honorable James E. Godfrey -

Of course, the power of the school board ceases once parental control is resumed. E.G., Dritt v. Snodgrass, 66 Mo. 286; Wright v. Board of Education, supra. The exact line of demarcation where school authority ends must of course depend upon the circumstance of each case.

In Jones et ux. v. Cody, Mich., 92 N.W. 495, a rule requiring pupils to go directly home from school was challenged. The school principal personally enforced the rule upon the streets and in stores adjacent to the school grounds. The court made this pertinent statement which we consider worthy of full quotation, 1.c. 496:

" \* \* \* The rule and the method of enforcing it are reasonable, unless it be the law that those in control of our public schools have no jurisdiction over pupils outside the schoolhouse yard. It is not only the legal right, but the moral duty, of the school authorities, to require children to go directly from school to their homes. All parents who have a proper regard for the welfare of their children desire it. The state makes it compulsory upon parents to send their children to school, and punishes them for failure to do so. The least that the state can in reason do is to throw every safeguard possible around the children who in obedience to the law are attending school. The dangers to which children are exposed upon the streets of cities are matters of common knowledge. Humanity and the welfare of the country demand that a most watchful safeguard should, so far as possible, accompany children, when required or allowed to be on the streets. Parents have a right to understand that their children will be promptly sent home after school, and to believe that something untoward has happened when they do not return in time. In no other way can parents and teachers act in harmony to protect children from bad influences, bad companionship, and bad morals. . . ."

The opinion quoted supra was written in 1902. We think the hazards to the safety and welfare of pupils en route to and from school are no less today.

Obviously, in this mobile age, school discipline and government cannot be bound within the walls of a classroom or the metes and bounds of the schoolyard. School-owned buses transport pupils

Honorable James E. Godfrey

from all corners of the school district. The classroom is no longer a cubicle, but may be a distant museum, concert hall, historical site, or natural woodlands and fields. In all such instances the school board has the care and control of the pupils and may provide rules for their government.

As a result of their express authority to govern school affairs, we are of the opinion that school boards have the power to employ necessary personnel to provide for the discipline, safety and welfare of pupils where the activity is directly and immediately connected with the school. Normally, the teachers would be sufficient personnel to implement discipline.

However, circumstances may require and justify additional personnel as teachers-aids or attendants.

As to the particular question here, i.e., employment of street crossing attendants: From the above cited authorities, it is clear that school boards are empowered to discipline and control pupils within the adjacent environs of the school premises and within times proximate to school activities. We are of the opinion that school boards have the power to employ attendants to provide for the safety and discipline of school children while traveling to and from school upon streets proximate to the school premises.

We note that school authorities have frequently used older student patrols or proctors for this purpose. We see no distinction between the exercise of authority through students and the exercise through employees.

In urban areas municipal authorities who are charged with providing for the safety of the citizenry in general oftentimes provide street crossing attendants along school routes. However, we do not think this overlapping of jurisdiction derogates the school boards authority over students en route to or from school. Also, not every schoolhouse is located within an urban municipal corporation.

#### CONCLUSION

Therefore, it is the opinion of this office that school boards have the authority to employ personnel for the purpose of providing for the safety and discipline of pupils while on streets proximate to the school premises during times proximate to school activities.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

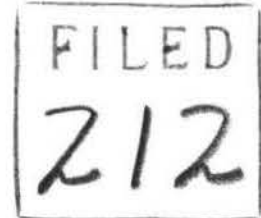
  
NORMAN H. ANDERSON  
Attorney General

CITIES: The City of St. Charles has the power under  
PLANNING: Chapter 89, RSMo 1959, to enact a zoning  
ZONING: ordinance providing for an historical area.  
HISTORICAL AREA:

OPINION NO. 212

September 14, 1965

Honorable Omer J. Dames ✓  
State Representative  
St. Charles County  
RR 3, Box 76  
O'Fallon, Missouri



Dear Representative Dames:

On April 28, 1965, you requested an opinion of this office as follows:

"Whether or not the City of St. Charles, a city of the third class, under the general statutes of the State of Missouri can under the law of the State of Missouri create a district under the zoning ordinances of the City of St. Charles wherein the architectural design of the present structures cannot be changed without prior approval of a named commission and wherein no new structures can be erected without prior approval of a named commission?"

We understand your inquiry to arise because of the desire to both restore and protect an historical area in the immediate vicinity of the First State Capitol of Missouri. This inquiry undoubtedly arises because of the recommendation of the State Park Board and the architect in charge of the restoration project for the First State Capitol of Missouri in which they made the following recommendations:

"Following the initial publication of this Restoration Plan, the Architect and the Missouri State Park Board recommended that the St. Charles City government enact a city ordinance which would establish a historic district in the area of the First Capitol buildings.

"This district would protect the state's investment in the First Capitol Restoration as well as preserve the original appearance

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of other nearby old buildings, which also will interest visitors to the Restoration.

" \* \* \* Under the Historic District ordinance, specialized zoning regulations would preserve the historical integrity of the area around the First Capitol.

"The area proposed for the St. Charles Historic District would include the eight blocks on South Main Street from Madison Street to Boonslick Road. In addition to the First Capitol structures, this area contains many early 19th century buildings in a relatively good state of preservation."

Chapter 89, RSMo 1959, as amended, vests in all cities, towns and villages authority to provide for planning and zoning. Section 89.020, RSMo 1959, provides as follows:

"For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Chapter 89.040, RSMo 1959, provides as follows:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other



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things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality."

It is to be observed that the state has delegated to cities a portion of its police power "for the purpose of promoting health, safety, morals or the general welfare of the community \* \* \*". A number of cases in Missouri and many cases in other states have discussed the foregoing clause. In *Landau v. Levin*, 213 S.W.2d 483, 485, Division I of the Supreme Court in referring to the power of the city to enact zoning ordinances under the foregoing enabling act said:

"All use restrictions and legislative enactments of the city of this character must be not only reasonable, they must not discriminate. They must further fairly tend to be of value and have substantial relationship to some purpose for which the city may exercise its police power. *Glencoe Lime & Cement Co. v. City of St. Louis*, 341 Mo. 689, 108 S.W.2d 143."

Division II of the Supreme Court in *Downing vs. City of Joplin*, 312 S.W.2d 81, 85, said:

"It is obvious, without further elaboration, that the exercise of the police power, as evidenced by the zoning of the area here involved to the uses prescribed in the ordinance and under the circumstances shown by the record, was reasonably calculated to promote the health, safety, morals or the general welfare of the community. As stated in *Flora Realty & Investment Co. v. City of Ladue*, supra, 'the police power, as evidenced by the zoning ordinance, is not limited to the mere suppression of offens[iv]e uses of property, but may act constructively for the promotion of the general welfare.'"

And in *Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n.*, Mo., 265 S.W.2d 374, 377, the Supreme Court stated the proposition in the following language:

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"A court will not disturb legislative or administrative action in zoning unless beyond reasonable doubt the action is an abuse of discretion or an excess of power, having no substantial relation to the evils to be remedied or to the public health, safety, and welfare or other proper object of the police power."

Many cases have been examined from this and other states but it is clear that the well-settled rule is that if the purpose of the zoning restrictions have a legitimate relation to public health, safety, morals or general welfare of the community the zoning restrictions of the city will be upheld as valid.

There is a theme, however, that runs through a few cases to the effect that where the zoning restriction is based solely upon aesthetic considerations then the zoning law will be declared invalid by the courts. See for example *City of St. Louis v. Friedman*, 216 S.W.2d 475, 478, and *State ex rel Magidson v. Henze*, 342 S.W.2d 261, 265.

As we view the matter, however, the problem presented should be decided on broader grounds than whether aesthetic considerations alone are involved. A number of cases in other states have upheld zoning regulations in order to preserve and carry on the historical character of the neighborhood. These cases have been largely predicated upon the general welfare of the community doctrine. See Opinion of the Justices to the Senate of Massachusetts, 128 N.E.2d 557, upholding the establishment of a historic district in the town of Nantucket, Massachusetts, *City of New Orleans v. Impastato*, 3 So. 2d 559 (La.), *City of New Orleans v. Levy*, 64 So. 2d 679 (La.), *Civello v. City of New Orleans*, 97 So. 440 (La.), *State ex rel Saveland Park Holding Corporation*, 69 N.W.2d 217 (Wisc.), *Santa Fe v. Gamble-Skogmo, Inc.*, 389 Pac.2d 13 (N.M.), and *In Re Opinion of the Justices (Mass.)*, 169 A.2d 762.

A number of cities have enacted ordinances which undertake to preserve intrinsic value of the historic monuments, places, and structures. Examples of such ordinances are New Orleans, Louisiana (Ordinance 14538), Williamsburg, Virginia (Ordinance No. 21, Section 23-45), Charleston, South Carolina (Zoning Ordinance Section 42-47, 1924) and Washington, D.C. (Title 40, U.S.C.A. Section 121).

In *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 Pac.2d 13, 1964, the question for determination was whether the historical zoning ordinances of the City of Santa Fe, New Mexico, was ultra vires

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of the city's power and whether the ordinance was valid and constitutional.

The defendant applied for a permit to remodel the exterior of a building within the historical zoning in Santa Fe. One requirement dealt with the size of the window panes to be used in the building. The defendant in remodeling the building failed to comply with this requirement and he was convicted of violating the city ordinance.

Since the above case involves many of the questions that may be raised concerning the power and authority to enact zoning ordinances which may be common to the question submitted herein, we quote at length from the opinion of the court.

The court stated, l.c. 15:

"[2,3] A municipality has no inherent right to exercise police power. Its powers are derived solely from the state. *Town of Mesilla v. Mesilla Design Center & Book Store*, 71 N.M. 124, 376 P.2d 183; *Munro v. City of Albuquerque*, 48 N.M. 306, 150 P.2d 733. We, therefore, examine the statutes in force at the time the ordinance was adopted directing our inquiry to whether the grant of zoning power authorized preservation of a historical area. It is agreed that the authority, if it is to be found, must be contained in §§14-28-9 to 11, N.M.S.A. 1953. §14-28-10 contains a specific grant of power to regulate or restrict the erection, construction, re-construction, alteration, repair or use of buildings, structures or lands, and §14-28-11 provides that 'such regulations and restrictions' shall be 'in accordance with a comprehensive plan \* \* \* to promote the health and the general welfare \* \* \*.' We note in passing that specific legislative authority was subsequently granted by the 'Historic District Act.' Ch. 92, Laws 1961.

"[4] Defendants assert that the enabling legislation limited a municipality's zoning power to enactment of regulations restricting the height, number of stories, and size of buildings; the size of lots and percentage thereof that may be occupied; the density of population, and the location and use of buildings for trade, industry, residence or other uses. We find no such restriction in the statute. Sec. 14-28-11, N.M.S.A. 1953, grants the authority to regulate and restrict 'in

accordance with a comprehensive plan \* \* \*; to promote health and the general welfare; \* \* \*.' The legislature, then, granted municipalities authority, by zoning ordinances, to restrict and regulate buildings and structures in accordance with a comprehensive plan for the general welfare of the city and its people. To be within the authorized purposes of the zoning ordinance must bear some reasonable relationship to the general welfare.

"The term 'general welfare' has not been exactly defined, we think, by reason of the same definitive problem expressed in *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 70, 109 P.2d 779, 787, regarding the phrase 'affected with a public interest,' where it was said:

' \* \* \* The phrase "affected with a public interest" probably can never be given an exact definition. This is probably desirable when we reflect upon the constant and ever changing conditions of our social and economic structure. This condition clearly implies the necessity for some degree of latitude allowable for obviously necessary judicial interpretation.'

"See, also, *Barwin v. Reidy*, 62 N.M. 183, 192, 307 P.2d 175, which described the public policy as a 'wide domain of shifting sands.'

"No decisions discussing the precise question of enabling legislation have been pointed out to us nor have we found any. However, analogous questions were before the Massachusetts Supreme Court on at least two occasions. The question there was the constitutionality of proposed legislation establishing and preserving historical areas in that state. In each case the right to exercise the police power depended upon whether preservation of such an historical area and style of architecture was comprehended within the public welfare. If it was, the police power could be constitutionally exercised to preserve and protect such areas.

"In the opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563, 566, it was said:

'The announced purpose of the act is to preserve this historic section for the educational, cultural, and economic advantage of the public. If the General Court believes that this object would be attained by the



restrictions which the act would place upon the introduction into the district of inappropriate forms of construction that would destroy its unique value and associations, a court can hardly take the view that such legislative determination is so arbitrary or unreasonable that it cannot be comprehended within the public welfare.'

"In a second opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557, 559, 561, the same question was presented regarding an act establishing historic districts known as '(1) Old and Historic Nantucket District, and (2) Old and Historic Siasconset District.' The purpose of the act was to promote the general welfare of the inhabitants of the town through 'the preservation and protection of historic buildings, places and districts of historic interest; through the development of an appropriate setting for these buildings, places and districts; and through the benefits resulting to the economy of Nantucket in developing and maintaining its vacation-travel industry through the promotion of these historic associations.' \* \* \*. The purpose was held to be for the promotion of the public welfare. We quote at some length from the Massachusetts court because of its special application to the situation presented by the instant case. In 128 N.E.2d at 561, 562, it was said:

' \* \* \* Can it rest upon the less definite and more inclusive ground that it serves the public welfare? The term public welfare has never been and cannot be precisely defined. \* \* \* '

"The court after discussing other decisions went on to say:

' \* \* \* We may also take judicial notice that Nantucket is one of the very old towns of the Commonwealth; that for perhaps a century it was a famous seat of the whaling industry and accumulated wealth and culture which made itself manifest in some fine examples of early American architecture; and that the sedate and quaint appearance of the old island town has to a large extent still remained unspoiled and in all probability constitutes a substantial part of the appeal which has enabled it to build up its summer vacation business to take the



place of its former means of livelihood. \* \* \*  
There has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts. (citing authorities)

'It is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town, \* \* \*.

'We are of opinion that in a general sense the proposed act would be an act for the promotion of the public welfare \* \* \*.'

"For other persuasive decisions, because they involved the question whether the taking, under eminent domain, for preservation of sites of historical interest was for a public purpose; in the public interest; or for the general welfare, see: United States v. Gettysburg Electric Ry., 160 U.S. 668, 681, 16 S.Ct. 427, 40 L.Ed. 576, (Site of the Gettysburg Address); Flacomio v. Mayor & City Council of Baltimore, 194 Md. 275, 71 A.2d 12, 14, (property where the 'Star Spangled Banner' which flew over Fort McHenry was made); State v. Kemp, 124 Kan. 716, 261 P. 556, 59 A.L.R. 940, (the Shawnee Mission property, an early Indian mission).

"[5-7] State courts generally have held that the police power may be exercised only to protect and promote the safety, health, morals and general welfare. 29 Fordham L.R. 729. Since the legislature can preserve such historical areas by direct legislation as a measure for the general welfare, it follows that municipal ordinances protecting such areas are authorized under enabling legislation granting power to zone for the public welfare. We, therefore, hold that the purpose of the Santa Fe historical zoning ordinance is within the term 'general welfare,' as used in the municipal zoning enabling legislation."

The court further stated, l.c. 17:

"[9] Under the restricted attack made upon the ordinance, it seems unnecessary to decide here whether aesthetic considerations, denied under earlier decisions, furnish ground for the exercise of the police power as is increasingly held by modern authorities. Berman v. Parker, supra; Opinion of the Justices, 103 N.H. 268, 169 A.2d 762; and see discussion

35 Boston U.L.R. 615; 32 U. of Cincinnati L.R. 367; 2 Wayne L.R. 63. In any event, without deciding the question, such considerations cannot be entirely ignored. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272. New Mexico is particularly dependent upon its scenic beauty to attract the host of visitors, the income from whose visits is a vital factor in our economy. Santa Fe is known throughout the whole country for its historic features and culture. Many of our laws have their origin in that early culture. It must be obvious that the general welfare of the community and of the State is enhanced thereby. Bearing in mind all these factors, we hold that regulation of the size of window panes in the construction or alteration of buildings within the historic area of Santa Fe, as a part of the preservation of the 'Old Santa Fe Style' of architecture, is a valid exercise of the police power granted to the city. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557; Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563; Opinion of the Justices, 103 N.H. 268, 169 A.2d 762; City of New Orleans v. Impastato, 198 La. 206, 3 So.2d 559; City of New Orleans v. Pergament, 198 La. 852, 5 So.2d 129; City of New Orleans v. Levy, 223 La. 14, 64 So.2d 798; and see State v. Wieland, 269 Wis. 262, 69 N.W. 2d 217. In Best v. Zoning Bd. of Adjustment of the City of Pittsburgh, 393 Pa. 106, 141 A.2d 606, 612, the court said:

'Not only is the preservation of the attractive characteristics of a community a proper element of the general welfare, but also the preservation of property values is a legitimate consideration \* \* \*'.

While the power of the City of St. Charles to enact a zoning regulation preserving a specifically defined area and requiring that area to conform to certain architectural specifications in order to preserve the historical effect of the area can probably be predicated upon "health, safety, morals or the general welfare of the community" authorization of the statute we find that the Legislature has emphasized and buttressed and pinpointed that wide authority by an amendment of Section 89.020 and 89.040 in 1959 by inserting in Section 89.020 the words "the preservation of features of historical significance" and inserting in Section 89.040 the

Honorable Omer J. Dames

words "to preserve features of historical significance".

The preservation of features of historical significance we conclude are within the general welfare of the community authorization. The amendment of these statutes by the Legislature was for the purpose of saying in express language so that it would not be misinterpreted or misunderstood that cities have the power to preserve an area which has historical significance. The use, however, of this phrase should not be narrowly construed. This does not mean that only ancient or historical buildings themselves should be preserved but rather an entire area may be incorporated into and made a part of a plan to preserve a historic flavor to the area. Obviously as the Courts have frequently stated, the area so designated by the city council or board of aldermen cannot be unreasonable or discriminatory but must have some reasonable basis and fit into the entire general plan for preserving the designated historic area.

You have further inquired as to whether the proposed zoning ordinance for the City of St. Charles could contain a provision which would require prior approval of the architectural design of a named commission before present structures could be changed. This problem can only be answered upon an examination of a specific ordinance. That question is therefore reserved.

#### CONCLUSION

The City of St. Charles has the power under Chapter 89, RSMo 1959, to enact a zoning ordinance providing for an historical area.

The foregoing opinion which I hereby approve was prepared by my Assistant J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

DRIVER'S LICENSE: When a person has both a chauffeur's license  
CHAUFFEUR'S LICENSE: as well as an operator's license and receives  
MOTOR VEHICLES: the necessary points under the Point System  
LICENSES: for revocation or suspension of his operating  
privileges, then both such licenses are re-  
voked or suspended.

OPINION NO. 213

August 31, 1965



Honorable Lawrence J. Lee  
Prosecuting Attorney  
City of St. Louis  
Municipal Courts Building  
14th and Market Streets  
St. Louis, Missouri

Dear Mr. Lee:

This is in reply to your opinion request in which you state:

"I would like an opinion from your office as to whether or not a person convicted of 'driving while intoxicated' where an accident is involved, is subject to his operator's and chauffeur's license being suspended or revoked or is he subject to merely his operator's license being suspended or revoked and not his chauffeur's license being suspended or revoked."

The revocation and suspension of operator's and chauffeur's licenses is governed by the Point System set forth in Sections 302.302 through 302.309, RSMo Cum. Supp. 1963. When the Director of Revenue receives notice of conviction or forfeiture of collateral, he assesses points against the offender according to Section 302.302, supra, the first paragraph of which reads as follows:

"1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. Points shall be assessed only after a conviction or forfeiture of collateral.  
\* \* \*" (Emphasis added.)

The suspension or revocation of driver's licenses is based upon the accumulation of points and affects "operating privileges," a plural term which we believe includes both chauffeur's licenses and operator's licenses. According to your facts, a revocation

Honorable Lawrence J. Lee

or suspension would result upon the assessment of the appropriate number of points. Section 302.304, supra, covers this subject and reads as follows:

"The director shall:

"(1) Notify by ordinary mail any operator or chauffeur of the point value charged against his record when the record shows four or more points have been accumulated in a twelve-month period;

"(2) Suspend the operating privileges of any person whose driving record shows he had obtained or accumulated eight points in eighteen months. The time of suspension shall not be less than thirty days nor more than ninety days;

"(3) Revoke the operating privileges of any person when his driving record shows he has obtained or accumulated twelve points in twelve months or eighteen points in twenty-four months or twenty-four points in thirty-six months;

"(4) Upon issuing a reinstated operator's or chauffeur's license, reduce the accumulated point value to six points." (Emphasis added.)

Section 302.020, RSMo 1959, requires those who wish to drive as a chauffeur to have a valid chauffeur's license and those who wish to drive a motor vehicle in a manner other than as a chauffeur must acquire a valid operator's license. Any person who has a chauffeur's license is not required to obtain an operator's license. However, there is nothing to prevent a person from obtaining both a chauffeur's as well as an operator's license. In fact, the Department of Revenue informs us that this is quite often done.

It is the opinion of this office that when a suspension or revocation occurs under Section 302.304, supra, these penalties apply to both chauffeur's and operator's licenses. If a person has both licenses, then both "operating privileges" are suspended or revoked. The entire operation of the Point System would be defeated if holders of both licenses would lose the privilege of driving under one of them but continue to operate a motor vehicle under the other.



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This reasoning is further reinforced by the language in Section 302.225, subsection 2, RSMo 1959, which reads as follows:

"2. Whenever any person is convicted of any offense or series of offenses for which this chapter makes mandatory the suspension or revocation of the operator's or chauffeur's license of such person by the director, the circuit court or magistrate court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses, then held by the person so convicted, and the court shall within ten days thereafter forward the same, together with a record of the conviction, to the director."  
(Emphasis ours)

#### CONCLUSION

Under the operation of the point system, providing for suspension and revocation of chauffeur's and operator's driving licenses, both chauffeur's and operator's licenses are suspended or revoked when the individual so licensed accumulates the necessary points set out in the statutes. In those situations, wherein a person has acquired both a chauffeur's license as well as a motor vehicle operator's license, then both such operating privileges are suspended or revoked when the proper number of points has been accumulated by such person.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Governor:  
Disapproval of Depositaries  
Auditor:  
Disapproval of Depositaries  
Treasurer:  
Selection of Depositaries  
Depositaries, Demand:  
Designation  
Constitution:  
Separation of Powers

- (1) Disapproval by Governor or Auditor of depositary selection is a veto.
- (2) Treasurer cannot be compelled by judicial process to select depositaries.
- (3) Existing depositaries remain lawful pending further designations.

OPINION NO. 216

May 7, 1965

Honorable Warren E. Hearnes  
Governor  
Executive Office  
Jefferson City, Missouri



Dear Governor Hearnes:

Reference is made to your letter wherein you requested the official opinion of this office as follows:

"I submit herewith for your opinion the following question: Does the Governor of Missouri have the power to veto the State Treasurer's selection or selections of banking institutions as state depositories under Article IV, Section 15 of the Constitution of Missouri, 1945 and the laws of Missouri?

"If the answer to the above question is in the affirmative, and assuming the selections made by the State Treasurer are disapproved or vetoed by the Governor, shall the State Treasurer then submit the names of different banking institutions as state depositories for the Governor's approval, not to include the names of those institutions previously disapproved, and if so, within what period after such disapproval."

The questions posed by you arise by reason of the submission to you of depositary selections for demand deposits by the State Treasurer, your disapproval of said selections and subsequent request for the submission of further depositary selections and the Treasurers refusal to submit further depositary selections. Copies of the correspondence between your

office and the office of the State Treasurer in regard to this matter have been made available to us and are set out below.

"January 21, 1965

The Honorable Warren E. Hearnes, Governor  
of the State of Missouri  
The Honorable Haskell Holman, Auditor of  
the State of Missouri  
Jefferson City, Missouri

Gentlemen:

Please be advised that as State Treasurer of Missouri, I have selected as depositaries of State moneys on demand deposit, the following banking institutions (which are presently serving as such depositaries):

Mercantile Trust Company National  
Association  
Saint Louis, Missouri  
Commerce Trust Company  
Kansas City, Missouri  
Central Missouri Trust Company  
Jefferson City, Missouri

The foregoing selections of depositaries have been made by me, pursuant to the requirements and provisions of the Constitution and Statutes of Missouri, and are submitted for your approval.

Will each of you please note your approval by signing and returning to me the enclosed copy of this letter. When I have received your approvals, I shall proceed to enter into written contracts, in quintuplicate, with each named depositary as required by law. A specimen copy of such proposed contracts is enclosed.

When the contracts have been executed by me and the respective depositaries, I shall forward them for the notation thereon of your approval, and thereafter, I will distribute the copies of the contracts in the manner specified by law.

Very truly yours,

/s/ M. E. Morris  
TREASURER OF THE STATE OF MISSOURI

APPROVED:

GOVERNOR OF THE STATE OF MISSOURI

/s/ Haskell Holman  
AUDITOR OF THE STATE OF MISSOURI

"January 22, 1965

Sir:

Pursuant to authority vested in me by provisions of Article 4, Section 15 of the Constitution of Missouri, 1945, and statutes of Missouri, I do not approve the banking institutions selected by the Honorable M. E. Morris, Treasurer of the State of Missouri, as depositories of state money on demand deposit, in his letter of January 21, 1965, to wit:

Mercantile Trust Company National  
Association  
St. Louis, Missouri

Commerce Trust Company  
Kansas City, Missouri

Central Missouri Trust Company  
Jefferson City, Missouri

/s/ Warren E. Hearnes  
GOVERNOR OF THE STATE  
OF MISSOURI

"February 19, 1965

Honorable M. E. Morris  
State Treasurer  
Capitol Building  
Jefferson City, Missouri

Dear M.E.:

I respectfully request that you submit to me for approval or disapproval the names of banking institutions as depositories of state money on demand deposit different from those submitted in your letter to me of January 21, 1965, and not approved by me as set forth in my letter to you of January 22, 1965.

Sincerely yours,

/s/ Warren E. Hearnes

Warren E. Hearnes"

"February 23, 1965

The Honorable Warren E. Hearnes  
Governor of the State of Missouri  
Jefferson City, Missouri

Dear Warren:

I acknowledge your letter of February 19, 1965, in which you request that I submit to you for approval or disapproval the names of banking institutions different from those submitted in my letter of January 21, 1965. Your letter was hand-delivered to me a few minutes before the press conference at which you released the letter and concerning which you commented at some length.

In my letter of January 21, 1965, I advised you of my selections, all of which were made pursuant to the requirements and provisions of the Constitution and Statutes of Missouri. I find no provisions in either the Constitution or the Statutes requiring that I make other selections, and I am cited to none by your letter of February 19, 1965.



It is my prerogative and responsibility under the law to make the selection of banking institutions in which shall be deposited all moneys in the State Treasury. The three institutions which I have so selected are qualified in every respect and by every test. These selections have been approved by the State Auditor.

Your letter of January 22, 1965, expressed no reason for your decision not to approve my selections and I am advised by counsel that I am under no duty to make other selections simply because you choose to withhold your approval arbitrarily.

As the State Treasurer and an elected official, I do not intend to abrogate the functions of my office. To comply with your request would constitute an abdication by me of my constitutional duty and power to select depositaries of state moneys, it would negate the State Auditor's approval of those depositaries, and, in effect, it would transfer to you my constitutional duty to select. Therefore, I respectfully decline to comply with the request in your letter of February 1, 1965.

Cordially,

State Treasurer"

The depositaries selected by the Treasurer for demand deposits in his letter of January 21, 1965, have been serving in this capacity pursuant to contracts entered into on the first day of February, 1963. Copies of these contracts have been made available to this office, but no useful purpose would be served by reciting the terms thereof in full. Each of the contracts, which are identical in form, contain the following provision:

"This contract shall continue until the first day of February, 1965, or until another depository is selected for the state funds governed by this instrument;  
. . . ."

This office has been informed that the state funds remain on deposit at these three banking institutions and the current receipts of the state are being deposited in these banking institutions as soon as the revenue collected and moneys received come into the state treasury.

The custody, investment and deposit of state funds is provided for by Article IV, Section 15 of the Constitution of Missouri as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. Banking institutions in which state funds are deposited shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits and interest thereon pursuant to deposit agreements made with the state treasurer pursuant to law. No duty

shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds." (Emphasis added.)

It is noted that the cited section of the constitution provides that the investment and deposit of state funds shall be subject to such restrictions and requirements as may be prescribed by law and that agreements shall be made by the state treasurer with depositaries pursuant to law. However, the power to designate depositaries granted to the treasurer, governor and auditor is a self-executing delegation of constitutional power. Therefore, the questions raised by your letter concerning the exercise of this power relate to a proper construction of the constitutional provision.

The constitutional provision delegating the power to the treasurer, governor and auditor to designate depositaries for state funds has never been construed by the courts. In expressing an opinion in regard to these powers, this office is guided by principles of constitutional construction approved by the Supreme Court of Missouri in *State ex rel. Moore v. Teberman*, 250 S.W. 2d 701, l.c. 705; *State ex rel. Randolph County v. Walden*, 206 S.W. 2d 979, l.c. 982, 983, 984; *State ex rel. Russell v. State Highway Commission*, 42 S.W. 2d 196, l.c. 202, 203; and *State ex rel. Heimberger v. Board of Curators of University of Missouri*, 188 S.W. 128, l.c. 130, 132. Thus it is presumed that words have been employed in their natural and ordinary meaning. No forced or unnatural construction is to be placed upon the language. Attempt is made to arrive at the true intent and purpose of those who drafted the instrument. Effect should be given to the spirit and intent of the instrument and the strict letter should not control if it leads to incongruous results clearly not intended. Extrinsic aids may be resorted to when the language used is ambiguous. The debates of the constitutional convention may be examined for aid and interpretation if the meaning remains in doubt.

The specific language of the constitutional provision applicable to the questions being considered in this opinion is as follows:

"The state treasurer shall be custodian of all state funds. All \* \* \* moneys received by the state \* \* \* shall go \* \* \* into the state treasury, \* \* \* the state treasurer shall deposit all moneys in the state treasury \* \* \* in

banking institutions selected by him and approved by the governor and state auditor. \* \* \*

Although not absolutely essential to the conclusions reached herein, the background and history of this constitutional provision does much to clarify and enlighten the understanding of the nature and extent of the powers and duties exercised by the three officers in designating state depositaries.

#### HISTORY OF OFFICE OF TREASURER

When Missouri became a state, the treasurer was not elected by the people. The Constitution of 1820, Article III, Section 31, provided for the appointment of the state treasurer by the general assembly, biennially, by joint vote of the two houses of the general assembly. Amendment Article VIII to the Constitution in 1850 - 51 provided for the election of the state treasurer to serve for a term of four years. The Constitution of 1865 and the Constitution of 1875 also provided for the election of the state treasurer. In the constitutional convention which submitted the Constitution of 1945, the original proposal for executive officers provided for the appointment of the state treasurer by the governor in a cabinet form of government. However, the cabinet form of government was rejected by the convention and the Constitution of 1945 continued the provision for the election of the state treasurer for the term of four years.

#### BACKGROUND OF CONSTITUTIONAL PROVISION

Prior to the adoption of the Constitution of 1875, the subject of depositaries for state funds was not provided for in the constitution and apparently there were no statutes in regard thereto. In theory, all moneys of the state were deposited in the vault of the Capitol Building in the care and custody of the state treasurer. The moneys were then disbursed directly from the vault by the treasurer upon the presentation of warrants. However, apparently it was the practice of the treasurer to deposit the state moneys with various banks and to draw upon such deposits when warrants were presented to him. Apparently bonuses were being paid directly to the treasurer by the various banks in which he had deposited state funds.

The constitution of 1875, Article X, Section 15, provided as follows:



"All moneys now, or at any time hereafter, in the State Treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General select, the said bank or banks giving security satisfactory to the Governor and Attorney-General, for the safe-keeping and payment of such deposit, when demanded by the State Treasurer on his checks--such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise." (Emphasis added.)

The recommendation to the convention by the committee on revenue and taxation of a section providing for the deposit of state moneys in banks selected by the state treasurer with the approval of the governor and attorney general provoked considerable discussion. The debate in regard to adoption of this section may be found in Volume X, pages 367 through 405, Debates of the Missouri Constitutional Convention of 1875, edited by Loeb and Shoemaker and published by the State Historical Society of Missouri.

The proposal represented something entirely new and apprehension of the innovation was expressed as follows, pages 373-374:

Mr. Lay:

"I want to hear what will be said upon the subject. I will not make any factious opposition to it--not oppose it simply because it seems to me to be an experiment or innovation. But it does seem to me, the best mode is to leave this money in the hands of the Treasurer of the State, an officer whom the people have selected to control it, and be responsible for it. The people of course, have nothing to do with the banks, but by



the law, they select a man whom they believe to be honest, competent and responsible, to take charge of this money and give bond, and be responsible for it, and it does seem to me that the safe rule after all, will be to leave this money in the hands of the officers, chosen by the people of the State to control, and to make him responsible for its forth-coming whenever it is wanted. It seems to me to be a dangerous rule, sir, to recognize in this Constitution or anywhere else, the right of the Treasurer or any other officer of the State to loan out this money, or to deposit it, and draw interest on it, in any shape or form. I believe the safe rule will be found, the one we have already adopted. The Governor, I believe, is required to approve the bonds given by the Treasurer. He is responsible for that, and the blame will devolve upon him, of course, if he takes an insufficient bond, and I think it is better to leave it where it is now, in the hands of the Treasurer."

The chairman of the committee on revenue and taxation stated the purpose of the section as follows, pages 374-375:

"Mr. Letcher: Mr. President, The reason why the Committee prepared this section was, that we learned that there was a large amount of money paid in, about the month of January each year, to the State Treasury. A portion of that money was to pay the July interest on the public debt, and that there was in his hands also, what is called an Executors and Administrators fund, that that money remained in his hands from the month of January as a general rule, until about the month of July, when the July installment of the interest would fall due; the question was, what was done with that money? Does that money remain in the strong box as was stated yesterday, or is it put elsewhere? If it is put elsewhere, why is it put elsewhere? Now, we have no information, excepting common talk. We only learn that such things have been done; that it is a sort of custom, a sort of right claimed by the officers. I do not mean the State Treasurer, but I mean that I have heard it in regard to County Treasurers, that after giving

their bond to the county, for instance, for the safe-keeping and forth-coming of the money, when it was called for, that it was none of the people's business, what they did with the money in the meantime.

"Well, now, we are told that the State Treasurer can, by putting the money at St. Louis or Kansas City, from the deposit make a great deal of money in the course of six months or a year, enough money to set up one handsomely for life. Whether it is done or not, I do not know, and I presume none of the members of my Committee know; but we came to this conclusion, hearing this thing much talked of. There is a great deal of complaint about it, there is a great deal of hob-nobbing about political conventions, as to who shall get the nomination for Treasurer, and no person can see in the mere salary of that office, anything worth contesting so strongly for, and there must be some great power or leverage which makes this office so sought for. The object therefore of this section, is to give the Convention an opportunity, if it sees proper, to provide that those funds may be put in bank. Now, as to the question suggested by the member from Cole (Mr. Lay), as to which is the best plan, we do not pretend to say; but we submit this, that the money is just as safe to the State, upon a bond or security given by banks, to the satisfaction of the Governor and Attorney-General, as it is upon a bond given by the Treasurer and approved by the Governor."

The question of the critical need for safeguarding the state's moneys and the desirability of earning bonuses accruing to the state on the deposit of such moneys was discussed as follows, pages 376-378:

"Mr. Todd: I, for one, have an interest in this question and am prepared to speak to it. The question with me is this. Is it safe and prudent for this State to keep its revenues in the iron box in that room, just beyond the rotunda, with no guard unless it be a man or two, when the habit of brigandage, plundering and robbing throughout this country, has become on land, what pirates are on sea. They go in

bodies, in fives and tens, suddenly come upon a community, go into a small place, and by their surprise, force and audacity, they take possession of what they want, whether it be a store or a bank and get away with their plunder without any successful resistance. We have stopping of Railroad trains, not only here in the western states, but as occurred recently in Illinois and just beyond Utica in the State of New York; and unlike the sea pirate, who is confined to the vessel, these men are scattered like a band of Roderick Dhu's.

"They are Roderick Dhu's men. They can be called and come together in an instant, and throw themselves upon a point, overcome and plunder it, and you cannot catch them.

"Now, the theory is, that all the vast revenues of this State, from time to time, are kept in that safe. The Treasurer is responsible for them by his bond. Persons say they are not kept there, that they are put in banks, under an arrangement between the Treasurer and the proprietor of the banks, and under which arrangement the money is not so exposed, and that large profits are derived from it, that somebody receives. Of course, this is a rumor; I give it no credit. I go upon the theory of the law, which is that that money is there. Now, is it safe and prudent for this State to keep those revenues, sometimes in such large amounts, in that safe, in this lonely, isolated capital, with no protection, in the present condition of the country, or in any ordinary condition, and we know that the condition now is extraordinary, in regard to that. We know that even cities are not entirely free, but we must seek the greatest safety for our taxes. We here, are trying to protect the people against being overtaxed, and that sort of thing, and while we are doing this, let us make what we do take from them secure, if possible. Now, the question is whether the money shall remain, as I have said, according to the theory of our law, or whether we shall have it divided up, and put in places where there is greater security, and with responsible depositaries. \* \* \*

Pages 379-380:

Mr. Todd:

"We are intelligent men. Now we want to relieve the Treasurer of this high responsibility, and want our funds safe, and if, by placing them in a safe condition, we can accomplish two things, to-wit: The relief of the Treasurer and profit to the State, why not do it, and make them secure. Now that would be the effect of it. Banks of as high responsibility as any in the State can be got to be depositories. There is no question about that, and when they ask what would be the security, why it is the same as is taken from the Treasurer--a bond with sufficient security and that too, under the selection and approbation of the Governor and Attorney-General.

"You may do more, if you please, but this seems to be sufficient. Banks of well-established character, banks of entire responsibility so far as that can be judged of, becoming depositories. Is it not safer to put the money into banks in that way, than to leave it in that vault, because I am not going to take the supposition that the money is not in the vault. The supposition is that it is there, and the question with us is, shall it remain there or go into these banks. Then by putting it into the banks two things will be accomplished. Instead of the money being locked up in those banks, the country is having the benefit of it. It is being used by the banks like other things. The banks become responsible to us and give us a bonus, an unusual thing, and then give us a rate of interest for the deposit for 3 or 6 months, or on call, which is a common thing, and instead of the profit to the State amounting to \$20,000 or \$50,000 as the member from Caldwell (Mr. Holliday) has said, I reckon the profit would come nearer to \$100,000. This thing has been fought against in other States, sometimes with success and sometimes not with success. In Pennsylvania it has been fought against ever since Cameron became umpire of Pennsylvania. One charge against him was



that he laid out very large sums of money, threw his conscience to the wind and became a public robber. It was charged and not denied, that in order to keep control of the State of Pennsylvania that by some of his family, his son-in-law, or somebody else, he kept the treasury in his family, whose average deposit was some \$600,000; and this was in banks at the highest interest for the benefit of the son-in-law or other member of the family.

"That was worth to him, all that he laid out and immensely more--an immense investment, yielding a fortune every year. Mr. Cameron never hesitated for a moment to make money by any means in his power, and by reason of his corrupt practices, Mr. Lincoln turned him out of his cabinet. Now, how can we in the face of such a plain proposition, founded upon everyone's personal experience, keep the money in our vault, in our office safes, in our store safes, unless we took it after bank hours, in the City."

The theory of keeping the state moneys in a vault in the Capitol as opposed to the actual practice of the treasurer depositing the moneys for his own benefit was further discussed as follows, pages 388-389:

"Mr. Gantt: Mr. President, I suppose every one knows now, as said by my colleague, that the funds of the State, the revenues which are collected, are not kept in this room, in the lower story of this capitol; practically they are all kept in the vaults of certain banks, and practically, I suppose, nobody doubts that a certain emolument accrues to the person who selects those banks as a depository for this money.

"Of that, I suppose no one has any question, and the object of this section by the Committee, and of this amendment by the member from Caldwell, (Mr. Holliday) is to put the profit arising from the selection of the depository, and the interest upon the money while it remains deposited to the benefit of the State of Missouri, instead of leaving it a perquisite of the office of Treasurer. \* \* \*



The loss of revenue to the state by not earning on state deposits was discussed by Mr. Gantt as follows, page 396:

"We are told forsooth that this system has worked very well in the time past. I will tell the members of this Convention how well it has worked. We have regularly lost from \$50,000 to \$100,000 per annum in the interest which has been received, not by us but by the person who has had the handling of the public money and who has been prudent enough to secure this return. What is the use of our shutting our eyes to facts which are as notorious as these? The object of this substitute offered by the Committee is to secure that money for the State."

Although Mr. Gantt favored lawful depositaries for the state's moneys, it was his opinion that the responsibility for the depositary should rest solely with the governor and he offered an amendment to that effect as follows, pages 383-384:

"Mr. Gantt: I also express my concurrence in the substitute which has been offered to the section. I approve of the policy and general scope of the original section, but I like the substitute because it goes further in the same direction, but I hope some amendment will be made and I propose to offer one which I will have read, for the purpose of information, at this state. I propose to

Amend the substitute by striking out the word 'he' in the 9th line and inserting in place of it 'Governor of the State' and strike out the words 'approval of the Governor and Attorney-General' in the 10th and 11th lines, so that it will read 'that the monies are to be deposited in such bank or banks as the Governor of the State may select';

"and then, it will go on,

'and that the banks will give such security as may be approved by the Governor and Attorney-General.'

"I prefer this mode because the Governor, if one of his functionaries makes a selection, may not entirely approve of the selection, and still may have some delicacy in disapproving it. I would put the responsibility of the selection upon the Governor himself, for naturally, as is suggested by the member from St. Louis (Mr. Brockmeyer) when the selection has been made, and bond taken from the bank and the money has been paid by the Treasurer to such bank, that will be an exoneration of the Treasurer, from all further responsibility in respect to that money, until it is drawn out by the Treasurer again. \* \* \*

and again on page 386:

"\* \* \* I want to put the responsibility upon the Governor to give him the untrammelled right of selection, he and the Attorney-General afterwards, to be the judges of the security which shall be given by the banks selected. \* \* \*

Objection to the proposal to give the governor sole responsibility for the designation of depositaries was expressed as follows, page 387:

"Mr. Hammond: I am opposed to the amendment. I do not see any good reason why the Governor should select the place of deposit for the monies of the State, in place of the Treasurer. I suppose the people of the State in selecting a Treasurer, select him somewhat with a view to his qualifications for that office, and the duties of that office are peculiar to it alone, and in the selection of the Governor, they will select him with a view to the duties of the Governor's office. Therefore, it does seem to me, that it is out of place, this innovation; and then, so far as the objection that was urged by the Chairman of the Committee, is concerned, that it would perhaps relieve or do away with this electioneering that has existed heretofore, in the Conventions, to secure the office of Treasurer, the effect of it, it seems to me, would be to transfer all that to the selection of the Governor. If these deposits are so desirable, as members seem to think they are, why the whole thing would be just thrown around

on the Governor, and we would have the Governor and Treasurer in one. I am opposed to the amendment."

Further opposition was expressed as follows, page 391-392:

"Mr. Lay: The remarks which I have made before, were on the section as reported by the Committee. I now desire to make a few remarks upon the amendment offered by the member from St. Louis (Mr. Gantt). That amendment provides that the Governor shall select the banks or depositories in which it is proposed to deposit the money of the State. It transfers the selection from the Treasurer to the Governor. Now, sir, the selection of these banks is the important matter in this whole thing. The important point in the whole thing is to guard properly this proposed plan when it goes into practical operation. The important question then upon the amendment of the member from St. Louis (Mr. Gantt) is, whether the Governor be the safer party, or the Treasurer, to entrust with the right of making the selection of these depositories. Upon that point I suggest this, sir; the member from Chariton (Mr. Hammond) has already suggested, that in the first place, the Treasurer is a man selected for this purpose by the people, and that he ought to be better qualified than anybody else; but acknowledging that presumption, if you please, then here is another consideration. The Treasurer gives a bond not only to account for and pay over, the monies he receives, but he gives a bond in general terms, to discharge faithfully the duties of his office. One of the conditions of his bond under the operation of this law would be, that he should faithfully discharge the duties of his office. That would cover also the selection of the depository. Now sir, if in the selection of this depository he selected an insolvent, worthless bank as the depository, the people would have some recourse on him on his official bond."

Mr. Lay also expressed his opinion as to the actual functioning of the section proposed by the committee as follows, page 394:

"\* \* \* Why, sir, if the Treasurer selects a good solvent bank, the chances are that the Governor and Attorney General will approve his selection; there will be no reason why they

should not do so.\* \* \*

The following comments were made by Mr. Gantt in his rebuttal remarks to the arguments against his amendment to make the governor solely responsible for the selection of depositaries, page 397:

"\* \* \*But as I said, the object of the amendment was to enable the Governor who is necessarily a man of character and dignity, or presumed to be such a man, whose character ought to be a pledge of integrity, and whose position ought to be a pledge of integrity, to give him the selection of the bank. But when the bank is thus selected suppose it to be a bank whose solvency is questionable, will not the Governor and Attorney-General have to approve the sureties when they are taken? To what other officer will you confide the task of approving of these sureties? If you will designate any officers who will be likely to prove more praiseworthy, I, for one, will acquiesce in them with pleasure. It was for the purpose of placing the responsibility upon the Governor and making him free from all suggestions of delicacy as to making an objection to the selection of the Treasurer, that the amendment was offered. As to the likelihood that the Treasurer will make more than before, or anything, under the new arrangement, I cannot see how it can be, for one moment. How can he? I take it that the details of this matter will be regulated by law, but if it were not, that the Governor would be bound, if he values his own reputation to select that depository which was of the best credit and offered the highest premium with good security. In other words, that the matter of the custody of those funds must be given to the highest and best bidder, and all this will have to be done in the face of day, and if anybody makes money then, the State can see it and condemn it. If anybody makes money now, it is all done in a corner, and nobody sees it except those who see, feel and touch the money.  
\* \* \*

Mr. Gantt's amendment was rejected by the convention, (page 402) and the section as it appears in the constitution authorizing the treasurer to select depositaries with the approval of the governor and the attorney general was adopted (page 405).

The section was adopted by a vote of 46 to 13. Some members of the convention were absolutely opposed to the principle of designating banks as depositaries for the state's moneys. One particular opposing speech is interesting when considered in the present day context as follows, pages 398-400:



"Mr. Bradfield: I desire simply to say in explaining my vote, on the question now before the Convention, that I have not yet been convinced of the propriety of departing so radically from the rule that has prevailed in this State, in regard to public monies. Now, I think there is a far greater and more important question involved in the subject matter under consideration than as to whether the State shall receive the benefit of the interest or bonus, accruing from the funds of the State Treasury, or which shall go to the Treasurer. The mere question is now, whether the State of Missouri shall be separate and divorced from the banks of the State or not. Now, sir, I am as much opposed to a union between the banks of the State and the State itself, as I am to the union between Church and State, and I would just as soon see an established religion in the State of Missouri, as I would see the State of Missouri under the control of the banking corporations of this State.

"Now, if the substitute as offered by the member from Caldwell (Mr. Holliday) prevails, what will it amount to? 'The whole revenue of this state' --it does not confine it to the subjects of revenue prescribed in the Report of the Committee--but 'the whole revenue of the State.' Two million dollars received from the hard earnings of the people of this State are to be deposited in some one bank or more of this State to be drawn out upon checks by the Treasurer of the State. Suppose that this Convention adopt the amendment proposed by my friend from St. Louis (Mr. Gantt) which leaves the selection of the bank in the hands of the Governor, giving him the power to designate the bank, what more corrupting and demoralizing influence can be thrown around the Chief Executive Officer of this State than such a proposition as that would throw around him. You leave the selection of the Governor of this State in the hands of the banking corporations. There will be fights between them as to who shall be Governor. You might as well dispense with your party conventions and just let the Directors of the banks of this State select your Governor. Or if you leave it to the Treasurer select your Treasurer. I say it is corrupting and demoralizing in its influence over the officers



of the State. Now so far as the argument of my friend from Cole (Mr. Lay) is concerned, I know no difference between the Treasurer of the State and the Governor: and the Governor is just as likely to be swayed by corrupt and improper influences as the Treasurer. So far as dollars and cents are concerned, if your Treasurer makes the profit now out of the money in the Treasury, he will make it then. He will take a bonus outside of that which is to be paid into the State Treasury.

"In the selection of the bank there will be bids, and unless there is something more than human nature in the Governors to be selected by this State, they will be placed at the mercy of the highest bidder, and probably they will get men in the Gubernatorial chair and in the Treasurer's office, who will be bought and sold like hogs, at so much a pound. Now, I am opposed to anything so demoralizing in its influence and tendencies as that. I hold that not one cent of profit should be derived to the State from any money drawn from the people by taxation, undisposed of, in the State Treasury. I would be in favor of engrafting, if necessary, in this Constitution, that any officer of this State, who directly or indirectly receives one cent of profit, shall be convicted of felony and put in the penitentiary. I am opposed to drawing one cent of money from the people of the State and putting it in the bank or in the Treasury, that is not needed for the absolute wants of the State. I want no surplus funds in the Treasury. I want nothing more received from the people than is absolutely necessary to meet the current expenses, and if there is an accumulation of money in the Treasury, I say you had better adopt a plan by which it will remain in the hands of the people instead of requiring them at a particular season to pay all the money into the Treasury.

"Let them hold it and pay it in installments, in order to meet the wants and necessities of the State.

"I think there is a very important and grave principle involved in this proposed change,

and I shall vote against all amendments and the section when it is presented for these reasons."

#### CONSTITUTION OF 1945

As has been noted above, the constitutional convention which drafted the Constitution of 1945, received and considered a recommendation that the executive offices of the state be set up on a cabinet form of government. The governor of course would be an elected officer. He in turn would appoint most of the other significant state officers as members of his cabinet, and both the state treasurer and the attorney general would be appointed by the governor. However the state auditor would remain an elected official.

Therefore, the section on designation of state depositaries was changed to provide that the banking institutions would be selected by the treasurer and approved by the governor and auditor. The auditor was substituted for the attorney general as an approving party because the committee which drafted the section felt that the two approving parties should be elected officials. If the section remained as it was in the old constitution, selection would be made by the treasurer and approval by the governor and attorney general. Inasmuch as the treasurer and attorney general would both be appointed by the governor, the designation of depositaries would in effect be made by the governor.

Discussion of this section is found in the Constitutional Debates, pages 2459 - 2472, pages 3279 - 3280 and page 3600. Judge Mayer, a delegate to the convention from St. Joseph, offered an amendment to strike the auditor from the section as an approving party. It is apparent from his discussion that he considered the designation of depositaries to be the joint action of the three officers and that inasmuch as the treasurer would be appointed by the governor, the auditor would always be outvoted in the designation of depositaries. The following excerpts from the debate reflect such thinking.

Page 2460:

"Mr. Mayer: Doctor, I notice that the Treasurer shall appoint, shall deposit this money with the approval of the banks approved by the Governor and the State Auditor. And also, I suppose this File contemplates the appointment of the State Treasurer, does it not?

"Mr. McCluer: Yes.

"Mr. Mayer: Well, if it does why put the Auditor in who is elected? He will have nothing to say about it. The Governor will appoint the Treasurer and the Governor and the Treasurer will decide where the money goes. Now, why divide the responsibility by putting the auditor in and practically have no vote?

"Mr. McCluer: Well, it was our thought that the auditor is the check upon the financial administration. It would be a proper officer to be consulted in making this deposit.

"Mr. Mayer: Well, but he is an accounting officer, is he not and, after all, if the treasurer appointed by the Governor and the Governor and the treasurer are going to approve the bank, why divide the responsibility? Why not let them do it and be responsible for it? Why drag in an elective officer who will really have nothing to say about it?

"Mr. McCluer: I have no great objection to that but I also think it is reasonable for them to consult the auditor."

Page 2465:

"Mr. Mayer: Mr. President, I have not made up my mind fully, therefore, I want to vote on the cabinet form of government but if we are going to have a cabinet form of government we ought to have one. If the Governor's going to appoint all these people he ought to appoint them and he ought to be responsible for them. The theory of the cabinet form is to elect a Governor and hold him responsible. Now, why drag in the State Auditor who won't really have a vote? He is the only one who won't be included in the cabinet form. He is the one who is to be elected. Now, why put him in with two cabinet members to vote? I don't know. It simply divides the responsibility. If we are going to have a cabinet form, let's put the responsibility on the

Governor where it belongs. Further more, as I understand it, the Executive File, if it is adopted, provides that the duties of the Auditor shall be limited to auditing. It is the only duty he can have -- auditing. As I understand, that is all he can do. The Legislature is forbidden to impose any other duty upon him. Therefore, I don't think he ought to have any duty with reference to the depositing of these funds."

Page 2467 - 2468:

"Mr. Moore: May I inquire? Do you think that it is good public policy to vest the sole power in one man to select the depositories of the state money?

"Mr. Mayer: Well I think, as a matter of practice, he does it all of the time anyway.

"Mr. Moore: Well, haven't we had some experience of that in the last few years of spreading the money out because of the three officers forcing it? I don't know whether that is true or not.

"Mr. Mayer: I don't know about that. If that's true, I never heard of it, but may I say this in answer to your question. Whoever you are going to have you ought to have in the Governor's cabinet, if you are going to have a Governor's cabinet. Why say the Governor and the Treasurer, if the Treasurer is to be appointed by the Governor, and the Auditor. The Treasurer, if he is appointed by the Governor, he is removable at the Governor's will and of course he'll vote with the Governor on the deposits. Now why drag the State Auditor in to take part of the responsibility.

"Mr. Moore: I agree with you on your premise, Judge, that if the Treasurer is an appointee of the Governor and he selects the Depository, that will be a selection made by the Governor and if we are going to have a Treasury . .

"Mr. Mayer: (Interrupting): Then, let him take the responsibility and don't drag the Auditor into it."

Page 2468:

"Mr. Mayer: I should like to ask him a question first. Well, if it is offered as a substitute rather than as an amendment to my amendment, Judge Park, then you still leave the Auditor to determine, to join in determining what banks shall be depositories.

"Mr. Park: I don't care who determines that.

"Mr. Mayer: Do you think the Auditor and the other two appointed officers should be in it?

"Mr. Park: It wouldn't make any difference regardless of whether he is an elected or appointed officer.

"Mr. Mayer: What vote would you have? The other two could always outvote him. The Auditor is appointed by the Governor and removed at the will of the Governor. Now why not let the Governor take all of the responsibility?

"Mr. Park: The Governor and the Treasury could do it.

"Mr. Mayer: That's my motion."

The only challenge to Judge Mayer's thinking that designation of depositories was the joint action of the three parties was by Mr. Shepley as follows, page 2469:

"Mr. Shepley: Judge, as I read this section here, it would not put the State Auditor in the position of being outvoted. It would actually require his approval and if he, am I wrong in my understanding that if the State Auditor disapproves, the depository cannot be used?

"Mr. Mayer: Well, I don't think the vote has to be unanimous. I assumed that a majority of them could determine it.

"Mr. Shepley: Well it reads here, 'with the approval of the Governor and the State Auditor.' Now it occurs to me with the meaning of that, it would require the approval of both of those



officials, the Treasurer of the selected bank or trust company, but then he would have to get according to this, the approval of the Governor and the State Auditor. Would you still, the real point of my question is, would you have any objection to leaving the Auditor in there if actually he is in a position to prevent the deposit of money in a bank which he did not approve?

"Mr. Mayer: No."

Former Governor Park was a delegate to the convention and he supported a substitute amendment similar to the one offered by Judge Mayer. However, it appears that Governor Park intended that his amendment should be applied to the approval of securities by the depositaries rather than to the designation of the depositaries.

Action on the amendments and on the section itself, was deferred by the convention until after the question of the cabinet form of government had been disposed of. Subsequent action by the convention rejected the cabinet form of government and the treasurer, auditor and attorney general, all remained elected officials.

At a later session, Dr. McCluer, Chairman of the committee which drafted the provision concerning depositaries made the following comment in regard to the committee's reasons for substituting the auditor for the attorney general, page 3279-3280:

"Mr. McCluer: The reasons for including the auditor rather than the attorney (general) were two. One, that under the files then before the convention, the auditor was elected an officer. And two, the auditor deals with fiscal matters and the deposit of the funds relating to financial matters we thought might be decided upon by the governor, the auditor and the treasurer, rather than by the governor, his legal advisor for the peoples attorney and the treasurer."

At a later session, Judge Mayer and Governor Park both withdrew their amendments and the section was adopted by the convention without further comments on the substance (3600).

Although there is no discussion on the subject in the Constitutional Debates, it is noted that the section proposed by the committee and adopted by the convention eliminated the provision included in the Constitution of 1875 in regard to the payment of bonuses by depositaries. The bonus provision was eliminated because at that time banks were prohibited from paying interest on demand deposits. The prohibition on the payment of interest on demand deposits was one of the consequences of the bank failures which followed the financial bust of 1929. In 1956, the constitutional provision was amended to provide for the investment of surplus state moneys in time deposit or government securities.

### DISCUSSION

#### I.

The designation of the depositaries for state moneys is made by the selection of the treasurer and approval by the governor and the auditor pursuant to the constitutional provision. Certain conclusions can be drawn from a study of the debates at the constitutional conventions which produced the Constitutions of 1875 and 1945.

The primary responsibility for the designation of depositaries is in the office of the state treasurer. It seems clear from a study of the constitutional debates that the delegates to the conventions which produced the Constitution of 1875 and the Constitution of 1945 intended that the state treasurer was to possess principal responsibilities in the depositary designation through his power of selection. References to the peculiar duties of the treasurer as the custodian of the state's money and references to the fact that the qualifications of an individual to perform these duties are the particular facts which the people will weigh in choosing this officer, make it clear that the delegates to the convention intended that he should play the principal role in choosing the places of deposit for the state's money. It was expected that the treasurer would be a person familiar with the field of finance and capable of exercising intelligent judgment in regard to sound banking institutions for the safekeeping of the state's funds. The first concern of the delegates to the convention of 1875 was to adequately safeguard the state's moneys. The second concern of the delegates was to deposit the moneys in institutions which would produce the greatest bonuses or interest to the state in the way of additional income. It was intended that the treasurer would be best qualified to accomplish these purposes. It also seems clear that the convention intended for the treasurer to take these two factors into primary consideration in selecting depositaries.

The intention of the constitutional conventions to place the principal responsibility for the designation of the depositaries in the hands of the treasurer is also indicated from amendments proposed in each convention. Efforts were made in each convention to make the governor the principal officer responsible for the designation of depositaries and such efforts were rejected.

## II.

The power and duty of the governor in regard to the designation of depositaries has been examined with reference to authorities from other jurisdictions for assistance in arriving at a sound conclusion. Research by this office has not revealed cases so similar in facts and law to be of persuasive influence.

The designation of depositaries by selection of the treasurer and approval of the governor and auditor can be viewed as the joint authority of three persons.

Section 1.050 RSMo 1959, provides as follows:

"Words importing joint authority to three or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the law giving the authority."

Thus, selection by the treasurer and approval by either the governor or auditor would be sufficient to lawfully designate depositaries. This theory is given some weight by the Constitutional Debates of 1945. The theory is also supported to some extent by *In Re State Treasurer's Settlement* (also cited as *Bartley v. Meserve*), Neb., 70 N.W. 532 (1897). The Nebraska law required state depositaries to secure deposits with bonds " \* \* \* approved by the governor, secretary of state and attorney general." Depositary bonds were approved by the secretary of state and attorney general, but not by the governor. In upholding the lawfulness of the security the court stated:

" \* \* \* it was not necessary that all three of the state officers should have concurred in the act of approving said bonds, but that the act of the majority was sufficient, all of them having met and conferred together. The rule is well settled that where authority is committed to three or more persons to perform a public duty or trust, if they all meet

for the purpose of executing it, a majority may decide."

State v. Zimmerman, Wisc., 196 N.W. 823 (1924) is further support for the "majority action" theory. Under a statute providing for expenditures of emergency appropriations " \* \* \* upon the certification of the governor, secretary of state and state treasurer, \* \* \*" certification was refused by the secretary of state. The court held that certification by the other two officers, being a majority, was sufficient. Both of the above cases proceed upon the theory that the authority exercised was in the nature of action by a board.

Contrary conclusions were reached in Ellison v. Oliver, Ark., 227 S.W. 586 (1921). The constitution provided that printing contracts " \* \* \* shall be subject to the approval of the governor, auditor and treasurer." The treasurer had not approved a contract approved by the other two officers. The court held that the separate approval of all three officers was required. This theory is supported by State v. Marron, N.M., 137 P. 845 (1913).

Although it is tempting to follow the "majority action" theory (the apparent existing impasse would thus be avoided), the principles of constitutional construction alluded to earlier in this opinion preclude the application of this theory to the provision under consideration. Mindful that words have been employed in their natural and ordinary meaning and that no forced or unnatural construction is to be placed upon the language, it must be concluded that two distinct and separate powers are exercised in the designation of depositaries: selection by the treasurer and approval by the governor and auditor. The approval power must be exercised by each of the officers in whom it is vested to effectuate a valid depositary designation upon selection being made by the treasurer. While the constitutional language makes no reference to disapproval by the governor or auditor yet disapproval would seem to be implied. Disapproval by either the governor or auditor is a veto and prevents depositary designations as contemplated by the constitution.

Mindful also that attempt should be made to arrive at the true purpose, spirit and intent of the instrument, it should be noted that the constitutional provision contemplates approval by the governor and auditor when the treasurer selects banking institutions, sound in capital, management and facilities and capable to service the complexities of the state's financial affairs. As noted in the Constitutional Debates " \* \* \* there will be no reason why they should not do so. \* \* \*"



In his letter to the governor dated February 23, 1965, the state treasurer declined to comply with the governor's request to submit for approval or disapproval depository selections different from those previously submitted and not approved by the governor. The treasurer noted that the governor had not expressed the reasons for his disapproval of the prior selections and took the position that he was under no duty to make further selections if the governor's approval was arbitrarily withheld.

However, it must also be noted that disapproval by the governor of a depository selection is not open to judicial inquiry. In *State ex rel Major v. Shields*, 198 S.W. 1105, the court stated as follows:

"\* \* \* the governors duties devolve on him by law, under a higher authority than the order of a court--i.e., the mandate of the constitution. The duties thus conferred are political, and his actions are entirely independent of the judiciary, and for a failure to perform same, he is responsible to the people alone; his liability being that of impeachment."

See also *State ex rel Robb v. Stone*, 120 Mo. 434, 25 S.W. 376; and Annotation, *Mandamus to Governor*, 105 A.L.R. 1124. Thus the governor may disapprove (or veto) the selection of a depository without giving any reason therefor, and he is answerable for such action only to the people.

### III.

As previously discussed, in the designation of state depositories the constitution has delegated the primary responsibility to the treasurer. The treasurer is the custodian of all state funds and in this constitutional capacity his custody is exclusive. Depositories must be banking institutions selected by him and approved by the governor and auditor. The constitution declares in clear and positive language that all state funds shall be deposited by the treasurer in banking institutions immediately upon receipt thereof. However, deposit of state funds cannot be made in banking institutions that have not been approved by the governor or auditor. The constitution is silent on the effect of disapproval by the governor or auditor or what is to be done if either of them disapproves; yet sound and cogent arguments can be advanced that the constitution implies that the treasurer should submit further depository selections for approval. It is of course



at once apparent that the process of submitting depositaries for approval could be repeatedly disapproved by either the governor or the auditor and this could likewise result in a stalemate.

On the other hand if the constitution should be construed to mean that disapproval was not contemplated; or that disapproval by the governor or auditor does not imply that the treasurer should submit further depositary selections, then the framers of the constitution left a complete void on the subject.

Nevertheless, the duties of the treasurer upon the disapproval or veto of depositary selections must be examined in view of the availability of judicial process to review, compel or coerce his actions.

A.

It has been concluded above that the disapproval or veto by the governor of a depositary selection is not open to judicial inquiry. The foreclosure of judicial inquiry in regard to actions by the governor is based upon the Constitution of Missouri, 1945, Article II, Section 1, which provides for the separation of powers as follows:

"Three departments of government-- separation of powers.--The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Article IV, Section 1, of the Constitution provides that the supreme executive power be vested in the governor. In his capacity as supreme executive he is absolutely free from any and all interference by the legislative and judicial departments of the government pursuant to Article II, Section 1.

The state treasurer is a constitutional officer who shares with the governor some of the supreme executive power. The extent to which the state treasurer is free from judicial or legislative

interference by reason of his position as a constitutional officer has not been determined by the courts. Executive officers other than the governor, including the treasurer, are subject to judicial process in the performance of duties purely ministerial in nature.

An excellent commentary concerning the power of the judiciary in relation to the executive department is found in 14 Am. Jur. 392-394 as follows:

"In the consideration of the power of the judicial department to pass on the acts of the legislative and executive departments, it is necessary to distinguish carefully the power of the courts to control the legislative or executive department by restraining or mandatory writs and the power of the court to review an act of either department when properly presented in a judicial proceeding. It is generally recognized that every act done or attempted to be done by any officer of the executive department in his official, and not in his individual, capacity, is shielded from all judicial interference or control, either by mandamus or injunction, even though such act may be founded in an error of judgment or an entire misapprehension of the official duty under the law. In other words, so long as a public governing body acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts at the instance of citizens, taxpayers, or other interested persons, in the absence of a statute authorizing such review or control. The courts have no general supervising power over the proceedings and actions of the various administrative departments of the government and will not interfere with conclusions of the executive department, fairly arrived at and with substantial evidence in support, and in the bona fide exercise of its discretion, whether the action is upon mixed questions of law and fact, or of law alone, until the final accomplishment of matters pending before them. Thereafter, the courts may be invoked to inquire whether the outcome of executive action is in accord with the laws of the country. The actions of the executive

department will not, however, be disturbed, except for fraud, alleged and proved; or where it is necessary to determine conflicting rights of private litigants, where a specific duty is assigned by law, and individual rights depend upon its performance, since courts may control ministerial acts by writs, mandamus, or restraining order; or where an action is beyond the scope of executive authority, such as the execution of an unconstitutional statute to the irreparable injury of a party in his person or property.

"In accordance with the general rule the courts will not interfere with executive action relating to executive, administrative, political, military, naval, international, or territorial matters, and matters relating to immigration, internal revenue, the enforcement of law, or the removal of officers."

In *State ex rel Johnson v. Regan*, 76 S.W.2d 736, 1.c. 741 the court commented upon the separation of powers doctrine as follows:

"[3] It has long been the settled law of this state that our courts will not interfere with either of the co-ordinate departments of government in the exercise of their powers, except to enforce ministerial acts required by law that leave to the officer no discretion. *State ex rel v. Meier*, 143 Mo. 439, 45 S.W. 306."

B.

Cases construing the extent of the exercise of judicial authority in regard to actions by officers of the executive department arise to a large extent by mandamus. One of the leading cases on this subject decided by the Supreme Court of Missouri is *State ex rel Gehner v. Thompson*, 293 S.W. 391. The court held that mandamus will lie against a public officer to compel the performance of a mere ministerial act, but will not lie to control a discretionary power. In the cited case, mandamus was sought against the state auditor to compel him to audit and approve for payment the claim of the assessor of the City of St. Louis against the state for certain statutory fees claimed to have been earned. In denying mandamus the court

found that the duties of the auditor in regard to the claim were discretionary and stated as follows, l.c. 398:

" \* \* \* For us to control or direct respondent's quasi judicial discretion (absent an arbitrary and clearly unlawful, or unjustifiable, action on his part) would mean for this court to impose our own judgment and discretion for that imposed upon respondent by the legislative department of this state, the assumption and arrogation of which power on our part would be to render abortive and ineffectual the statute prescribing the powers and duties of the state auditor.

"[3-5] The rule is general that the applicant for relief by mandamus must prove that he has a clear, unequivocal, specific, and positive right to have performed the thing, or action, demanded, and the remedy by mandamus will not lie, if the right is doubtful. State ex rel. v. Dickey, 280 Mo. 536, 548, 219 S.W. 363; State ex rel. v. Stone, 269 Mo. loc. cit. 342, 190 S.W. 601; State ex inf. v. Gas Co., 254 Mo. loc. cit. 532, 163 S.W. 854. Furthermore, a ministerial duty may be enforced by mandamus only when it is shown that the duty is one in respect to which nothing is left to discretion. State ex rel. v. Hudson, 226 Mo. 239, 265, 126 S.W. 733. \* \* \*"

The authority of the judiciary to compel executive officers (with the exception of the governor) to perform ministerial duties is well established in the State of Missouri. In State ex rel Folkers v. Welsch, 124 S.W.2d 636, the St. Louis Court of Appeals by mandamus compelled the building commissioner of the City of St. Louis to grant a permit to the relator for the erection of a gasoline filling station. The court described a ministerial act as follows, l.c. 639:

"\* \* \* A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion



as to the propriety or impropriety of doing the act in the particular case. State ex rel. Jones et al. v. Cook, 174 Mo. 100, 118, 119, 120, 73 S.W. 489."

In State ex rel S. S. Kresge Co. v. Howard, 208 S.W.2d 247, the Supreme Court by mandamus compelled the state comptroller to certify a claim for payment to the state auditor upon the grounds that the action required of the comptroller was a positive ministerial duty not involving an exercise of discretion. In State ex rel. Reorganized School Dist. No. 4 of Jackson County v. Holmes, 231 S.W.2d 185, the state auditor was compelled by mandamus to register and certify school district bonds. The question as to whether mandamus was a proper remedy is not discussed, but it is apparent that the duty of the auditor being compelled by the court was a ministerial action not involving discretion on the part of the officer.

C.

However, as a general rule, mandamus may not be employed to require the performance of a discretionary duty. State ex rel Kavanaugh v. Henderson, 169 S.W.2d 389, l.c. 392. Although the writ may not compel the performance of a discretionary act, mandamus may be employed to put an officer in motion to perform a discretionary duty. Thus in State ex rel Best v. Jones, 56 S.W. 307, l.c. 309, the court stated the rule as follows:

"Where a discretion is vested in a public officer, the courts will by mandamus compel the officer to exercise that discretion, but will not direct how it shall be exercised, or what conclusion or judgment shall be reached."

In the cited case, relators sought mandamus against the directors of a school district to require the directors to establish and construct additional schools. The court found that mandamus as requested would result in interference by the courts with the discretion of the directors and thus the writ was denied. In other leading cases which enunciate the principle that mandamus will require an officer to exercise discretion, the courts have been reluctant to issue the writ. Thus in State ex rel Schulz v. Fogerty, 195 S.W.2d 908, mandamus against the mayor and other officers of University City to compel the issuance of a special tax bill was denied; in State ex rel Gehrig v. Medley 28 S.W.2d 1040, mandamus against directors of a school district to compel the erection of a school building was denied. In State ex rel LeShure v. O'Hern,



149 S.W.2d 914, mandamus against the prosecuting attorney of Jackson County to lend his name to an information in quo warranto against the city manager of Kansas City, Missouri, was refused. However, in State ex rel Shartel v. Humphreys, 93 S.W.2d 924, mandamus was issued at the relation of the attorney general and the State Board of Health to compel the officers of Maplewood and Richmond Heights to abate a public nuisance arising from open sewage in these communities.

Exhaustive research by this office has not revealed any case in which a constitutional state elective officer has been subject to judicial process in the performance of discretionary duties. It appears that these constitutional officers have never been compelled or coerced by the judiciary in the exercise of discretionary functions, either by way of directing the manner of performance of a duty, by directing that the discretion be exercised one way or the other, or by review upon allegations that the discretion had been exercised arbitrarily or capriciously. Cases against these state officers appear to be limited to the area of ministerial acts.

D.

The constitutional powers under examination involve selection by the treasurer and approval by the governor and auditor. If it may be assumed arguendo that the treasurer may be compelled by judicial process to exercise the power of selecting depositaries under a given fact situation, the selection might meet with the approval of the governor and the disapproval of the auditor. The governor's act of approval is not subject to judicial inquiry as noted above. However, if the treasurer can be compelled to exercise his discretion in making selections, the legal theories which support such compulsion would provide for judicial examination of the act of disapproval by the auditor on the grounds that the discretion was arbitrary and capricious. As noted in State ex rel Shartel v. Humphreys, 93 S.W.2d 924, 1.c. 926:

"\* \* \* But such discretion cannot be arbitrarily exercised, that is, exercised in bad faith, capriciously, or by simple ipse dixit. When so exercised, it is regarded that there was no discretion, recognized by law, and in such case mandamus will lie. \* \* \*"

However, other legal principles examined by this office indicate that the writ will not lie against the treasurer and the auditor in the exercise of their powers designating depositaries inasmuch as it will not lie against the governor. A general rule is stated in 34 Am. Jur. 919 as follows:

"\* \* \* If the act sought to be enforced cannot be made effectual by the rest of the board without the concurrent action of the governor, the writ will not issue against them alone."

The principle is discussed in more detail in an annotation found at 105 A.L.R. 1140, as follows:

"However, if the writ will not lie against the governor, mandamus has been denied where it would be ineffective unless it also ran against him.

"In a Louisiana case in which mandamus was refused to compel the governor and other members of a board of liquidation to assemble and take action upon the bonds of the relator and decide whether they were fundable in state bonds, the court reasoned that whenever by the Constitution and laws the state executive officers are vested with discretionary functions in their performance of civil duties, or political powers and responsibilities are conferred upon the executive department as a whole, the members thereof are likewise exempt from judicial control, although some of the officers, in the performance of their ordinary official duties, might be amenable to mandamus. \* \* \*"

Although the principle is neither supported nor refused by Missouri authorities, cases of other jurisdictions in support thereof are as follows: *People ex rel Bruce v. Dunne*, 258 Ill. 441, 101 N.E. 560, 1.c. 565; *State ex rel Latture v. Board of Inspectors*, 114 Tenn. 516, 86 S.W.319; and *State ex rel Hope v. Board of Liquidation*, 42 La. Ann. 647, 7 S. 706. It is interesting to note that in the Louisiana case the court relies to some extent on the theory that the other officers shared the supreme executive power of the state with the governor in the matter which required their action.

Some support is found for the theory that mandamus will lie against state officers as members of a board in the performance

of a discretionary duty even though the governor is a member of the board. In *Huidekoper v. Hadley, et al.*, 177 Fed. 1, the United States Circuit Court of Appeals for the 8th circuit issued mandamus against all of the members of the Board of Equalization of the State of Missouri, except the governor, compelling the board to discharge certain duties. By provisions of the constitution the Board of Equalization consisted of the governor, state auditor, state treasurer, secretary of state and attorney general. The case is distinguished from the application of the principle under discussion inasmuch as four officers of the board, excluding the governor, were subject to the writ and a majority of the board or three officers could perform the duties of the board. Therefore, the writ was effectual without the concurrent action of the governor.

## E.

This discussion in regard to possible judicial compulsion or coercion against the state treasurer in the exercise of his power of selection in designating state depositaries has centered around the theory of mandamus. Other possible judicial remedies are declaratory judgment and injunction. Most of the basic principles discussed herein in regard to mandamus apply as well to these remedies. In *State ex rel Shartel v. Westhues*, 9 S.W.2d 612, the discretionary action of the secretary of state was under injunction of the circuit court. In quashing the writ, the court referred to the separation of powers provision of the constitution and declared that the exercise of discretionary powers by public officials cannot be controlled by injunction. In *State ex rel State Highway Commission v. Sevier*, 97 S.W.2d 427, the Supreme Court made absolute a provisional rule in prohibition against the Circuit Court for interfering with the ordinary functions of the executive department of the state government by injunction. In *Selecman v. Matthews*, 15 S.W.2d 788, the Supreme Court affirmed the circuit court in refusing to enjoin the State Highway Commission, finding that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of judgment and discretion which the law reposes in him as a part of his official duties. It is specifically noted that the law reposes the discretion in the officer and not in the courts.

## F.

Further examination of authorities discloses that judicial process, if available against the treasurer in exercising his

power of selection in designating depositaries, must be invoked by a party entitled to relief. The cases cited in regard to mandamus make it clear that the remedy is available when personal or property rights are being withheld or infringed upon by the refusal of the public officer to perform his duty. Thus in *State ex rel Folkers v. Welsch*, supra, the building commissioner of the City of St. Louis had refused to grant a permit to the relator, for the erection of a gasoline filling station. In *State ex rel Shartel v. Humphreys*, supra, the attorney general and the State Board of Health brought the mandamus proceeding on behalf of the general public to abate the nuisance of noxious open sewage and to protect the health of the community. Injunction will issue only to prevent or to correct irreparable injury. In *Jacobs v. Leggett*, 295 S.W.2d 825, 1.c. 834, the court discussed the availability of declaratory judgment as follows:

"[14,15] The Joplin case further lays down these standards by which the instant case must be judged, 161 S.W.2d loc. cit. 413: 'But, when it is attempted to be so used and a judicial declaration is sought the court must be presented with a justiciable controversy--one appropriate for judicial determination--a case admitting of specific relief by way of a decree or judgment conclusive in character and determinative of the issues involved. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000; *Anderson, Declaratory Judgments*, Sec. 8, p. 27; 16 Am. Jur., Sec. 46. There must be a sufficiently complete state of facts presenting issues ripe for determination before a court may declare the law. 'A mere difference of opinion or disagreement or argument on a legal question affords inadequate ground for invoking the judicial power.' *Borchard, Declaratory Judgments*, p. 77; *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 103 A.L.R. 1089.'

"In *State ex rel. Chilcutt v. Thatch*, 359 Mo. 122, 221 S.W.2d 172, loc. cit. 176, we stated: '\* \* \* the question presented must be appropriate and ready for judicial decision. [Citing cases.] Plaintiffs' petition must present a real and substantial



controversy admitting of specific relief through a decree of a conclusive character, as distinguished from a decree which is merely advisory as to the state of the law upon purely hypothetical facts.' See also Cotton v. Iowa Mut. Liability Ins. Co., 363 Mo. 400, 251 S.W.2d 246, 249."

It has not been suggested to this office that personal or property rights or other injuries recognizable in the law are available to any party which can form the basis for a judicial proceeding against the state treasurer in the matter under consideration.

G.

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, is the landmark case in which the Supreme Court of the United States discussed and enunciated basic principles concerning the enforcement of duties by public officers. One of the basic principles enunciated by the court was whether judicial relief is available is to be determined, not by the officer or the person to whom the writ is directed, but by the nature of the thing to be done. In recent years, the court declared in Baker v. Carr, 369 U.S. 186, 2 L.Ed. 2d 663, 1.c. 702, as follows:

"There are, of course, some questions beyond judicial competence. Where the performance of a 'duty' is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or another (Ky. v. Dennison, 16 L.Ed. 717, 729) for to do so would be to take over the office. Cf. F.C.C. v. Pottsville Broadcasting Co. 84 L.Ed. 656."

Upon a consideration of the foregoing discussion concerning the availability of judicial process, it is the opinion of this office that the nature of the thing to be done by the state treasurer in selecting depositaries for the approval of the governor and the auditor is not subject to judicial process in its exercise. The duties of the treasurer, governor and auditor in the designation of depositaries are within the scope of executive powers, and in the exercise of such powers the officers are free from any interference whatsoever by the judicial branch of the government pursuant to Article II, Section 1 of the Constitution. Therefore, if the contention is sound that the



constitution implies that the state treasurer shall submit further selections of depositaries upon disapproval by either the governor or the auditor of selections previously submitted, he is responsible for his failure to make further selections only to the people and may not be compelled or coerced in the matter by the courts.

#### IV.

This opinion has concluded that disapproval by the governor or the auditor of depositary selections by the treasurer prevents the designation of such selections as depositaries for state funds. It is further concluded that the state treasurer cannot be compelled or coerced by judicial process to submit further depositary selections for the approval of the governor and auditor. Therefore some comment is in order concerning the lawfulness of the three existing depositaries upon the expiration of depositary contracts on February 1, 1965. Although provisions therein continue the contracts in effect until other depositary selections are made, it is doubtful that these provisions alone are effective to continue existing lawful depositaries. However, it is unnecessary to determine the legal effect of these contractual provisions.

An applicable principle is stated in 42 Am. Jur. 726, as follows:

"A designation of a depositary is valid until the expiration of the term of office of the person designating, and until a new designation is made, but in the absence of statutory authority it will not bind his successor."

A similar statement appears at 26 A. C.J.S. 227 and there is nothing in the Missouri Constitution, statutes or case law contrary to this principle. In *Town of Canton v. Bank of Lewis County*, 92 S.W. 2d 595, 1.c. 600, the question before the Supreme Court was whether a depositary bond continued beyond the expiration date of the depositary designation under circumstances in which a bank continued acting as a depositary for municipal funds. In holding the surety liable, the court indicated that the bank continued as a lawful depositary until a new designation was made. In *City Savings Bank v. Wayne County Treasurer*, Mich., 47 N.W. 690, 1.c. 691 and *Palo Alto County v. Ulrich*, Iowa, 201 N.W. 132, 1.c. 134, 135, the courts held that depositaries remained lawful until new designations were made.

Therefore, it is the conclusion of this office that the existing depositaries continue to be lawful pending further designations.

## V.

Under the conclusions of this opinion, a stalemate is indicated among the three constitutional state elective officers in regard to the designation of new depositaries for state funds. Apparently the authors of the constitution did not contemplate such a stalemate and no provision was made to resolve situations in which a stalemate might develop. In seeking a solution to the present impasse, this office has reviewed authorities from other jurisdictions. Whether by experience or foresight, some sister states have established procedures for the designation of depositaries which prevent an impasse from taking place.

In Virginia, depositaries for state funds are designated by a Treasury Board composed of the state treasurer, comptroller and state tax commissioner. Concurrence by a majority of the board is sufficient to make a lawful designation (Code of Virginia, Section 2 - 177). Substantially the same method for designating depositaries is followed in Louisiana, Wisconsin and Pennsylvania. In some states, designation of depositaries is the exclusive power of the state treasurer or the governor. In other states, the cabinet form of government is provided for and the principal state officers are appointed by the governor. In these states, depositary designations are made by members of the cabinet and thus the power and responsibility resides in the governor's office.

Therefore, the current impasse in regard to depositary designations can be avoided in the future upon lawful provision being made which would prevent an impasse from taking place. Some of the alternatives which are apparent from the methods employed by other states are as follows: absolute power to designate depositaries could be granted to a single officer, such as the governor or treasurer; the selection of depositaries could continue in the office of the treasurer with approval being required by a board composed of three or more officers and with an affirmative requirement for additional selections upon disapproval; or the complete power to designate depositaries could be conferred upon a board composed of three or more officers with clear authority in a majority of the board to act. Inasmuch as the power of designating depositaries is constitutional, a constitutional amendment would be required to accomplish any of the changes discussed above.

CONCLUSIONS

Pursuant to Article IV, Section 15, Constitution of Missouri, 1945, two distinct and separate powers are exercised in the designation of depositaries: selection by the state treasurer and approval by the governor and state auditor. Disapproval by either the governor or auditor of banking institutions selected by the treasurer as depositaries of state moneys on demand deposit prevents the designation of such banking institutions as state depositaries. The constitution contemplates approval by the governor and auditor when the treasurer selects banking institutions with sound capitalization, capable management and adequate facilities to service the complexities of the state's financial affairs. However, the governor may disapprove (or veto) the selection of a depositary without giving any reason therefor, such disapproval is not subject to judicial inquiry, and he is answerable for such action only to the people.

The primary responsibility for the designation of state depositaries is in the office of the state treasurer to be exercised through the power of selection. Upon disapproval by either the governor or the auditor of depositary selections, sound and cogent arguments indicate that the constitution contemplates the submission by the treasurer of further depositary selections for the approval of the governor and the auditor. However, in designating depositaries the governor, auditor and treasurer exercise constitutional, executive, discretionary powers. Pursuant to Article II, Section 1 of the Constitution (the separation of powers provision), these officers are free from interference by the judicial branch of the government in the exercise of such powers. Therefore, the state treasurer may not be compelled or coerced by judicial process to submit for approval additional and different selections of banking institutions as depositaries of state moneys on demand deposit upon the disapproval by either the governor or auditor of banking institutions previously selected.

Existing depositaries, lawfully designated by selection of a former state treasurer and approval by a former governor and the incumbent auditor, continue as valid depositaries by operation of law pending new designations.

Very truly yours,

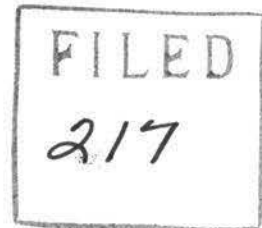
  
NORMAN H. ANDERSON  
Attorney General

AUTOPSY: The 1961 amendment to Section 194.115, V.A.M.S.,  
CORONERS: does not authorize a coroner of a Class III county  
PHYSICIAN: to order an autopsy performed without the consent  
of the next of kin or without having been so directed by a coroner's jury.

OPINION NO. 217

June 22, 1965

Honorable Bill D. Burlison  
Prosecuting Attorney  
Cape Girardeau County  
Cape Girardeau, Missouri



Dear Mr. Burlison:

This is in answer to your request for an official opinion of this office which reads as follows:

"Does §194.115 V.A.M.S. now give a coroner of a Class III county authority to authorize an autopsy without the consent of the next of kin or without having been so directed by a coroner's jury?"

The duties and authority of the county coroner are set out in Chapter 58, RSMo. The primary statutory authority of the coroner relating to an inquest and coroner's jury is stated in Section 58.260. This section has been construed to allow the coroner to order an autopsy performed in connection with, and as an incident to, an inquest to be held before a jury upon the body of a person supposed to have come to his death by violence or casualty. Crenshaw v. O'Connell, 235 Mo. App. 1085, 150 S.W.2d 489, 491; Patrick v. Employers Mutual Liability Insurance Company, 233 Mo. App. 215, 118 S.W.2d 116. These cases also ruled that the coroner may not order an autopsy to be performed without the consent of the next of kin in the absence of statutory authorization. Except in cities of 700,000 or more population and first class counties (Section 58.451, RSMo 1959) no authorization is given a coroner to order an autopsy except as a result of an inquest, with one possible exception.

The courts, in the Crenshaw and Patrick cases, specifically reserved any ruling on the question of whether Section 58.610 authorizes a coroner to order an autopsy to be performed without an inquest when some creditable person shall have declared under oath that a person came to his death by violence or other criminal act of another. This opinion is not intended to make any ruling upon this question.



Honorable Bill D. Burlison

Section 194.115, does not provide the coroner with any additional authority to order an autopsy to be performed. This section provides in part, as follows:

"1. Except when directed by a public official or agency authorized by law to order an autopsy or post-mortem examination it is unlawful for any licensed physician or surgeon to perform an autopsy or post-mortem examination upon the remains of any person without the consent of one of the following: \* \* \*"  
(Emphasis added.)

The underlined portion of this paragraph was inserted as an amendment in 1961. Prior to that time, there was some question as to whether a licensed physician or surgeon could perform an autopsy without a proper consent from the next of kin even if authorized by a coroner's jury. This office answered this question in the affirmative on June 26, 1953, in an opinion to Lane Harland, Prosecuting Attorney of Cooper County, which we have enclosed. In our opinion, this amendment merely places statutory approval upon our conclusion and does not in any way enlarge the power of a coroner to order an autopsy to be performed.

#### CONCLUSION

It is the opinion of this office that, with the possible exception herein noted, a coroner of a county of the third class is not authorized to order an autopsy to be performed without the consent of the next of kin except in conjunction with an inquest held before a coroner's jury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure



June 22, 1965



Honorable Richard J. Rabbitt  
Representative  
8th District, St. Louis City  
Room 407A, Capitol Building  
Jefferson City, Missouri

Dear Mr. Rabbitt:

In your letter of May 10, 1965, you inquired as to the validity of House Bill No. 691 now pending before the Legislature.

The validity of House Bill No. 691 depends, in part, upon the authority of the Legislature to establish statutory presumptions of certain facts as a rule of evidence. Whether a statute which provides that the present physical condition of a member of a paid fire department is presumed to have been incurred in line of duty unless the contrary is shown by competent evidence is within the power of the Legislature to enact.

We have been unable to find any court decision in this state where the precise question now at issue has been ruled upon. There are several court decisions dealing with the authority of the Legislature to enact laws creating a statutory presumption of certain facts upon proof of other facts. One of the latest decisions is Borden Company v. Thomason, 353 S. W. 2d 735. In this case, the court was considering the validity of an act of the Legislature regulating the sale of milk and milk products. Among other points considered by the court was a provision of the statute that in the absence of evidence to the contrary, "the statutory presumption that a grocer's cost of doing business is 8% of the invoice price to the grocer."

In discussing the authority of the Legislature to enact rules of law governing presumptions, the court said l. c. 755:

"The applicable rule is well stated in City of St. Louis v. Cook, 359 Mo. 270, 221 S. W. 2d 468, 470, as follows:

"Giving a regard to due process, the power to provide such an evidentiary rule is qualified in that the fact upon which the presumption or inference is to rest must have some relation to or natural connection with the fact to be inferred, and that the inference of the existence of the fact to be inferred from the existence of the fact proved must not be purely arbitrary or wholly unreasonable, unnatural, or extraordinary. \* \* \* And it is clearly beyond the legislative power to prescribe what shall be conclusive evidence of any fact. O'Donnell v. Wells, 323 Mo. 1170, 21 S. W. 2d 762 \* \* \*. It is "only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed (or inferred), and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." And see Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 137, 55 L. Ed. 78. Also see McFarland v. American Refining Sugar Co., 241 U. S. 79, 86, 87, 36 S. Ct. 498, 60 L. Ed. 899, and Morrison v. People of State of California, 291 U. S. 82, 88, 89, 54 S. Ct. 281, 284, 78 L. Ed. 664. In the Morrison case the Court said: 'The decisions are manifold that within the limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' And see Schwegmann Bros. Giant Super Markets v. McCrory, supra, 112 So. 2d 606, 617[6]."

In Tot v. United States, 319 U. S. 463, 87 L. Ed. 1519, the United States Supreme Court held Congress was without power to create the presumption sought to be created by the Federal Fire Arms Act, to wit: that from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in

interstate or foreign commerce, and (2) that such receipt occurred after July 30, 1938, effective date of the statute.

In discussing the matter of the authority of Congress to enact statutory presumptions, the court said, 319 U. S. L. C. 467:

"The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

Applying these principles of law to the Bill now under consideration, the validity of the Bill depends in part as to whether there is some rational connection between the facts proved and the facts presumed, i. e., whether there is a reasonable or rational basis for concluding that the physical impairment mentioned in said Bill has some rational connection with the employment. We believe this would depend primarily upon medical science and is beyond our authority to determine from the facts submitted herein.

In our research, we have found a decision of the Supreme Court of Florida, which considered a statute similar to the Bill now under discussion. In the case of City of Coral Gables v. Brasher, 120 So. 2d 5 (1960), a city policeman applied for his retirement benefits from the city based on a disability which he contended was incurred in the line of duty, his disability being a heart condition. The Retirement Board held he was entitled to ordinary retirement benefits because his condition was not the result of his employment and awarded him a smaller retirement benefit. On appeal, the Supreme Court of Florida considered the validity of a statute enacted in 1957 which is as follows:

"Section 1. Any condition or impairment of health of any and all police officers employed in the State of Florida caused by tuberculosis, hypertension, heart disease or hardening of the arteries, resulting in total or partial disability shall be presumed to have been suffered in line of duty unless the contrary be shown by competent evidence, provided, however, that such police officer shall have successfully passed a physical examination on entering into such service, which examination fails to reveal any evidence of such condition. Nothing herein shall be construed to extend or otherwise affect the provisions of Chapter 440, Florida Statutes, pertaining to Workmen's Compensation."

In discussing the constitutionality and validity of this statute, the court stated l. c. 9:

"This rule has been followed by this court in other cases which we do not consider necessary to recite. From these and other cases the courts have deducted the general rule that so long as there is a rational connection between the fact proven or to be proven and the ultimate fact presumed and the adverse party is given reasonable opportunity to proffer evidence and have a jury decide the facts in issue, there is no violation of due process or equal protection guaranteed by the state or federal constitutions. For an excellent annotation on the subject, see 162 A. L. R. 495."

It would appear that the decision of the Supreme Court of Florida cited above is some authority for holding that the Bill now under discussion does not violate the due process or equal protection clause of the state or federal constitutions.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



AGRICULTURE- SWINE BUYING STATIONS:  
LIVESTOCK MARKETING LAW - SWINE:  
BUYING STATIONS:

Swine Buying Stations are livestock  
markets.

July 21, 1965

Opinion No. 226

George C. Stiles, D.V.M.  
State Veterinarian  
Department of Agriculture  
Jefferson Building  
Jefferson City, Missouri



Dear Doctor Stiles:

Reference is made to your letter of May 14, 1965, wherein you requested an opinion from this office as follows:

"I respectfully request a formal opinion on whether or not swine buying stations are considered as livestock markets.

"At the present time there are approximately 100 swine buying stations in the state of Missouri which are unlicensed and un-inspected. Originally these buying stations bought slaughter swine only.

"It has been brought to my attention recently that several are selling stocker and feeder pigs for return to Missouri farms unvaccinated and un-inspected.

"Missouri is cooperating in the National Hog Cholera Eradication Program and I feel that buying stations presently are a threat to the Hog Cholera Eradication Program."

From telephone conversations with you in regard to this matter, we understand that swine buying stations came into being by operators of packing houses. A particular packing house would establish a station in a community with an employee in charge. Swine producers in the area could then sell their swine to the packing house for slaughter.

However, this basic format whereby swine were sold to the packing house through a local way station has been added to and modified. In some instances, stocker and feeder pigs sold to or at a swine buying station have been resold and returned to farms. Furthermore, swine buying stations have been established by persons or associations other than packing houses. Swine purchased at such stations are sometimes resold directly to packing houses for slaughter and sometimes resold to farmers as stocker and feeder pigs.



Section 277.020 (1), RSMo 1959, defines livestock to include swine. Section 277.020 (2), RSMo 1959, defines livestock sale or market as follows:

"A place of business or place where livestock is concentrated for the purpose of sale, exchange or trade made at regular or irregular intervals, whether at auction or not, except this definition shall not apply to markets operating under the supervision of the Federal Public Stockyards Inspection Service or to any public farm sale or purebred livestock sale, or to any sale, transfer, or exchange of livestock from one person to another person for movement or transfer to other farm premises or directly to a licensed market;"

A swine buying station is a place where livestock is concentrated for the purpose of sale. Therefore, such stations are within the scope of the cited statute unless one of the exceptions thereto applies. The only exception which might be applicable to swine buying stations is that part of the statute which refers to a sale of livestock from one person to another person for movement or transfer to other farm premises or directly to a licensed market. However, as noted in the description of swine buying stations, sales made through such stations are not limited to sales for movement from one farm premise to another farm premise and are not limited to sales from one person to another person for movement directly to a licensed market.


A survey of the provisions of Chapter 277, the Missouri Livestock Marketing Law, reflects that one of the principal purposes of the act is to prevent the spread of livestock diseases. The act does not attempt to supervise the sale of livestock from farmer to farmer when the transfer of such livestock is made directly from farm premises to farm premises. Also, the act does not attempt to supervise the sale of livestock by a farmer when made for movement directly from the farm premises to slaughter. However, it appears that the act does attempt to supervise the sale of livestock if the livestock is concentrated at one place, gathered from many farms, and may be returned to other farms for stocker or feeder purposes. Supervision of such sales is essential to prevent livestock disease from spreading.

#### CONCLUSION

It is the opinion of this office that swine buying stations, as described herein, are livestock sales or markets as defined by Section 277.020 (2), RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

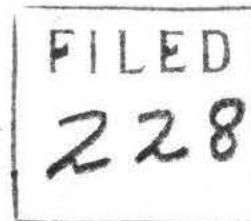
FEES AND SALARIES:  
SHERIFFS:

In a county of the second class with less than one hundred thousand inhabitants a sheriff who receives a commission for a partition sale under Section 528.610, RSMo 1959, must collect and pay such commission to the county treasurer as directed by Section 57.380, RSMo 1959, minus that amount he may retain under Section 57.340, RSMo 1959.

OPINION NO. 228

June 7, 1965

Honorable Donald E. Dalton  
Prosecuting Attorney  
St. Charles County  
First National Bank Building  
St. Charles, Missouri



Dear Mr. Dalton:

This is in answer to your request for an opinion of this office, which reads as follows:

"Please furnish me with an official opinion of your office on the following question:

"'In a county of the second class which contains less than one hundred thousand inhabitants, is the compensation of a sheriff for partition sales, pursuant to Section 528.610 V.A.M.S., subject to the limitation specified in Section 57.340?'

"Your attention is directed to Section 57.280 with reference to itemized fees allowed in 'civil matters', which it will be noted does not specifically include a commission allowed in partition suits. Your attention is also directed to the fact that the Court is authorized to appoint a special commissioner to conduct the sale in partition suits in lieu of the sheriff (See Section 528.580). Your attention is also directed to Section 57.380 and to your previous opinion number 132, dated July 15, 1964, prepared by Assistant Joseph Nessenfeld."

Chapter 528, RSMo, applies to partition suits in Missouri. Section 528.610, RSMo 1959, allows a commission to sheriffs for making partition sales and reads as follows:

"As a compensation for his services in making a sale of real estate under the provisions of this chapter by order of court for the purpose of partition, the sheriff shall receive a commission on the amount of sales not exceeding two per cent on the first one thousand dollars, and one per cent on all sums over that amount and under five thousand dollars, and one-half of one per cent on all sums over that amount."

Chapter 57, RSMo, applies to sheriffs in Missouri. Section 57.380, RSMo 1959, makes it the duty of the sheriffs of second class counties to collect fees, etc., and reads as follows:

"The sheriff in all counties of the second class shall charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and other money that accrues to him or his office for official services rendered in civil and criminal matters, by virtue of any statute of this state, and all the fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as provided in section 50.360, RSMo, less that amount of fees from civil matters which he is authorized to retain by section 57.340. He is not entitled to collect the per diem allowed to the sheriff as a member of the board of equalization and board of appeals, as provided in section 138.020 RSMo."

Thus, when a sheriff is allowed a commission under Section 528.610, it is his duty to collect and pay that commission to the county treasurer unless he is allowed to retain part or all of said commission by virtue of Section 57.340, RSMo 1959. Section 57.340 (1) reads as follows:

"1. In counties of the second class, which contain less than one hundred thousand inhabitants, the sheriff may withhold and retain, as compensation for his official services in civil matters, from the fees, penalties, charges, commissions and other money collected by him for his services in the matters, the sum of three thousand nine hundred dollars for each year of his official term. He shall not retain, during any one month, except the last month of each year of his official term, a sum exceeding one-twelfth of the aforesaid three thousand nine hundred dollars, and any amount collected and received

in excess of one-twelfth during any such month, shall be paid by him at the end thereof to the county treasurer. He may, during the last month of any year of his official term, withhold from the amount collected and received by him for services in civil matters during the month, a sufficient amount as will cause his compensation for the official year to reach the sum of three thousand nine hundred dollars. If at the end of any year of his official term, he has not collected and retained the sum of three thousand nine hundred dollars, he may withhold and retain a sufficient amount, from moneys collected by him in civil matters in the succeeding year of his official term, to cause his compensation for the official year for which he has not received his full compensation, to amount to three thousand nine hundred dollars."

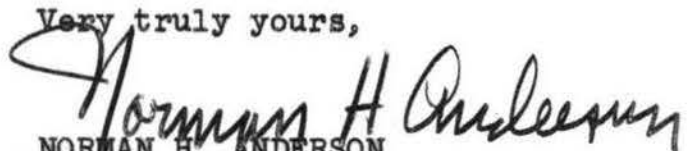
The fact that Section 57.280, RSMo 1959, establishing certain fees for sheriffs, does not list partition sales does not affect the above conclusion since it is the duty of the sheriff under Section 57.380 to collect and pay to the county treasurer any fees, etc., accruing to the sheriff or his office "by virtue of any statute of this state."

#### CONCLUSION

It is the opinion of this office that in a county of the second class with less than one hundred thousand inhabitants a sheriff who receives a commission for a partition sale under Section 528.610, RSMo 1959, must collect and pay such commission to the county treasurer as directed by Section 57.380, RSMo 1959, minus the amount he may retain under Section 57.340, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL AMENDMENT: Ballot title for House Joint  
Resolution No. 1

May 25, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: House Joint Resolution No. 1

Dear Mr. Kirkpatrick:

Pursuant to your request of May 17, 1965, and  
pursuant to the directive found in Section 125.030  
RSMo 1959, I submit the following ballot title in  
relation to the above subject:

Authorize St. Louis County and  
St. Louis City to adopt a plan  
for partial or complete govern-  
ment of all or any part of the  
county and city and provide the  
method of selecting a board of  
freeholders.

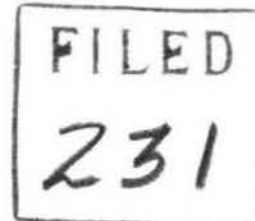
Yours very truly,

NORMAN H. ANDERSON  
Attorney General



CONSTITUTIONAL AMENDMENT: Ballot title for House Joint  
Resolution No. 3.

May 25, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: House Joint Resolution No. 3

Dear Mr. Kirkpatrick:

Pursuant to your request of May 17, 1965, and  
pursuant to the directive found in Section 125.030  
RSMo 1959, I submit the following ballot title rela-  
tive to the above subject:

Authorize a person to be elected  
Governor not more than twice or  
not more than once if he served  
more than two years of a term to  
which another person was elected.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

ACKNOWLEDGEMENTS: A recorder of deeds is not authorized to refuse to  
LAND SURVEYORS: record a "plat" or survey of real estate on the  
grounds that the signature of the registered land  
surveyor who has prepared the document has not been  
acknowledged.

OPINION NO. 234

October 18, 1965



Mrs. Olean Barton, Acting Secretary  
State Board of Registration for  
Architects and Professional Engineers  
Box 184  
Jefferson City, Missouri 65102

Dear Mrs. Barton:

This is in answer to your request for an opinion of this office as to whether a recorder of deeds may refuse to accept a plat or survey of real estate for recording which bears the signature and personal seal of the registered land surveyor making the survey on the grounds that the signature was not acknowledged. It is our understanding this question includes "plats" of cities, towns and villages governed by Chapter 445, RSMo 1959, as well as surveys in which land in various locations is simply surveyed and a record made thereof.

The only basis for refusing to accept such a survey for the reason indicated appears to be Section 59.330, RSMo Supp 1963, which provides in part:

"It shall be the duty of recorders to record:

"(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices: \* \* \*"

It will not be necessary to determine whether "plats" or other land surveys are included within the requirements of this statute as it is our opinion that a recorder of deeds is not authorized to refuse to record a "plat" or survey of real estate on the grounds that the signature of the registered land surveyor who has prepared the document has not been acknowledged.

Section 59.330 provides that the documents included therein to be suitable for recording shall be "proved or acknowledge according to law." The only legal requirements relating to the signature of a registered land surveyor are found in Sections 344.110 and .120, RSMo 1959, which provide:

Mrs. Olean Barton

Section 344.110:

"Every registered land surveyor shall procure a personal seal, in form approved by the professional engineering division of the board, and shall affix the seal, and his signature upon all maps, plats, surveys or other documents, before the delivery thereof to any client, or before offering to file or record any such map, plat, survey, or other document in the office of the recorder of deeds of any county, or in the office of the city clerk of any city or town, or with the clerk or other proper officer of any school, road, drainage, or levee district, or other civil subdivision of this state."

Section 344.120:

"It shall be unlawful for the recorder of deeds of any county, or the clerk of any city or town, or the clerk or other proper officer of any school, road, drainage, or levee district, or other civil subdivision of this state, to file or record any map, plat, survey, or other document prepared by any land surveyor, which does not have impressed thereon, and affixed thereto, the personal seal and signature of the registered land surveyor by whom, or under whose authority and direction, the map, plat, survey, or other document was prepared."

Neither of these sections require that the signature of the registered land surveyor must be acknowledged before the particular document may be recorded. Therefore, we feel that when such a document is signed and sealed by the surveyor who has prepared it, it has been "proved" according to law.

If the document is a more formal plat of a city, town or village governed by Chapter 445, additional requirements must be met before such a plat may be recorded. See particularly Section 445.030. Again, however, none of these requirements included the acknowledgement of the signautre of the registered land surveyor who prepared it. If such a plat is prepared according to the requirements of Chapter 445, in our opinion it also has been "proved or acknowledged according to law."

CONCLUSION

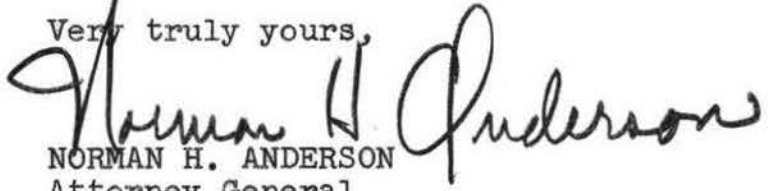
A recorder of deeds is not authorized to refuse to record a "plat" or survey of real estate on the grounds that the signature

Mrs. Olean Barton

of the registered land surveyor who has prepared the document has not been acknowledged.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

Opinion No. 235  
Answered by Letter -  
Nowotny

June 7, 1965

Honorable Allen S. Parish  
Prosecuting Attorney  
Saline County Court House  
Marshall, Missouri 65340



Dear Mr. Parish:

This is in reply to your request for an opinion of this office reading as follows:

"Section 140.740-2, R.S. Mo., 1959, provides for an attorney's fee of ten per cent of the delinquent personal property taxes due for the attorney for the county collector. The Saline County Court has asked me to write you and ask your opinion as to whether or not a higher fee, for example, totalling twenty-five per cent, could be allowed the collecting attorney in such a case."

At the outset there is a rule that a county court possesses no powers, except those conferred by statute. Jefferson County v. Cowan, 54 Mo 234, 237, 238.

Section 140.740, RSMo 1959, reads as follows:

"1. Before any suit shall be brought to recover delinquent tangible personal property taxes, the collector shall notify the delinquent taxpayer by regular mail, addressed to the last known address of such taxpayer, that there are taxes assessed against him, stating the amount due and the years for which they are due, and that if the same are not paid within thirty days an action will be brought to recover such taxes; for which notice a fee of twenty-five cents may be charged and collected by the collector. In any



action to recover said personal property taxes a certificate of the collector that he has mailed said notice as herein required and giving the date of such mailing shall be attached to the petition and shall constitute prima facie evidence that such notice has been duly given.

"2. In each such action a fee in the amount of ten per cent of the taxes due, but in no event less than five dollars, shall be allowed the attorney for the collector. Such attorney fee and all collector's fees shall be included in the judgment for taxes in such action."

Attached are copies of Attorney General Opinions to Honorable J. T. Campbell, dated April 28, 1953, Honorable Lyndon Sturgis, dated November 22, 1955, and Honorable Paul E. Williams, dated December 2, 1959. Under these opinions it is the duty of the prosecuting attorney to file suit for the collection of delinquent personal property taxes, to charge a fee under Section 140.740, and in second and third class counties to pay that fee to the county treasurer. And that fee is for the purpose of requiring the delinquent taxpayer to bear at least part of the expense of collection.

Following the reasoning of these opinions and the clear and unequivocal language of Section 140.740 in setting the fee at ten percent of the taxes due, it is our opinion that a higher fee cannot be allowed.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

COMMERCIAL VEHICLES: The state collector of revenue has the power to  
CAMPERS: classify as commercial motor vehicles, "campers" which are regularly used to haul freight, merchandise, or more than eight passengers, as well as motor vehicles that were intended and contemplated by the manufacturer to regularly carry freight, merchandise or more than eight passengers.

OPINION NO. 237

October 26, 1965

Mr. John A. Paden, Supervisor  
Motor Vehicle Registration  
Department of Revenue  
P. O. Box 100  
Jefferson City, Missouri 65102



Dear Mr. Paden:

This is in answer to your request of May 18, 1965, for an official opinion of this office which reads as follows:

"Number One:

"Under the provisions of Paragraph Five of Section 301.070 which reads 'The decision of the Director, as to the type of motor vehicles and their classification for the purpose of registration and the computation of fees, therefore shall be final and conclusive'. Is this taken to mean that the Director has the authority to classify a camper as a passenger vehicle or a commercial vehicle?

"Number Two:

"Under Section 301.010, Paragraph One, which defines a commercial motor vehicle as 'a motor vehicle designed or regularly used for carrying freight or merchandise or more than eight passengers'; does this Section, in itself, make the camper a commercial motor vehicle?"

Generally speaking, a camper is a motor vehicle, having living accommodations including facilities for cooking, sleeping and enjoying life in as near a civilized fashion as possible while on the road, contained in a cabin of some sort which constitutes a portion of the body of the motor vehicle. The cabin may be a permanent part of the body, or it may detach. Campers are not commercial motor vehicles per se, however, the director has the authority to classify certain campers as commercial motor vehicles, based on the statutory definition of commercial motor vehicles, as discussed below.

Mr. John A. Paden

As we understand the situation, a wide variety of motor vehicles are being outfitted as campers. Some vehicles are designed by the manufacturers solely for the purpose of being used as campers. Others are marketed by the manufacturers as pick-up trucks with a camping unit attached. This camping unit would be in the nature of a metal cabin which can be fitted onto the bed of the pick-up at the whim of the owner. Other individuals buy the pick-up and cabin from separate sources, or they fit a cabin of their own construction onto a pick-up truck. Still other owners convert motor vehicles, obviously designed for commercial purposes such as milk trucks, bread trucks or busses, into campers. Because of the many forms a camper may take, only a broad definition will encompass them all.

The legislature may properly delegate to an official or a board charged with the administration of the particular subject the power to classify motor vehicles for a proper determination of the amount of license fee or tax each shall pay. Smith v. State, 100 A. 778, 130 Md. 482.

Section 301.070, RSMo 1959, confers on the state collector of revenue the power to classify motor vehicles. But the collector is without authority to provide for a classification of vehicles different from a statutory classification. Campbell v. Cornist, 22 P. 2d 63, 163 Okla. 213. He is to determine into which class a particular motor vehicle falls by reference to the statutory definition of that particular class as set out in Section 301.010.

Section 301.010 defines a commercial motor vehicle as a "motor vehicle designed or regularly used for carrying freight or merchandise or more than eight passengers." (Emphasis added.)

The statute is in the disjunctive so that either the design or the use of the vehicle may bring it within this definition.

The design portion of the statutory definition pertains only to the vehicle rather than the business to which it is put.

Since any motor vehicle that is regularly used for carrying freight or merchandise or more than eight passengers is by statute a commercial motor vehicle, we need concern ourselves only with the design of a motor vehicle designed or used as a camper.

State v. Lasswell, Mo. App., 311 S.W. 2d 356, a 1958 opinion of the Springfield Court of Appeals specifically deals with the question of design, in determining whether or not a pick-up, used merely as a means of transportation, was a commercial motor vehicle. The court stated, 1.c. 358[5], [6]:

"[5] \* \* \* In consideration of this question, we must be controlled by the statutory definition of 'commercial motor vehicle' in Section 301.010(1)

Mr. John A. Paden

to-wit, 'a motor vehicle designed or regularly used for carrying freight and merchandise'; and, since the state frankly concedes that there was no evidence that defendant's Ford pickup had been 'regularly used for carrying freight and merchandise,' our inquiry is restricted further to the narrow question as to whether the jury reasonably might have found that such pickup was 'a motor vehicle designed \* \* \* for carrying freight and merchandise.' (All emphasis herein are ours.)

"[6] 'Designed' has been defined as 'appropriate, fit, prepared, or suitable' and also as 'adapted, designated, or intended.' 26A C.J.S. 863; Smith v. Commonwealth, 190 Va. 10, 55 SE2d 427, 429. See also Black's Law Dictionary (4th Ed.), pp. 533-534. When applied to property, 'designed' ordinarily refers to the purpose for which it has been constructed [26A C.J.S. 863], and the purpose contemplated and intended by the manufacturer, not the purchaser, usually becomes the controlling factor. Consult United States v. Sommerhauser, D.C. Kan., 58 F.2d 812, 813; Jacobs v. Danciger, 328 Mo. 458, 467, 41 SW2d 389, 391 (5), 77 A.L.R. 1237; State v. Etchman, 184 Mo. 193, 201, 83 SW 978, 980. 'Freight is defined as the transportation of goods' [ex parte Lockhart, 350 Mo. (banc) 1220, 1228, 171 SW2d 660, 663]; and, 'merchandise' is a broad and comprehensive term, embracing all tangible articles of commerce--whatever is usually bought or sold in trade. State v. Jeffords, Mo., 64 SW2d 241, 242; 57 C.J.S., Merchandise, p. 1055.

"Merchandise may mean cambric, needles, or crow-bars, sugar or vinegar, Coates No. 200 cotton thread or two-inch cable rope, or \* \* \* any one of the hundreds of articles classed as merchandise' [Whitewater Mercantile Co. v. Devore, 130 Mo. App. 339, 347, 109 SW 808, 809], and the term 'merchandise' also may encompass agricultural or horticultural products. State v. Long, 203 Mo. App. 427, 429, 220 SW 690, 691. So, it may be said that a 'commercial motor vehicle' within the contemplation of the statutory definition here controlling, to-wit, 'a motor vehicle designed \* \* \* for carrying freight and merchandise' [Section 301.010(1)], is a motor vehicle suitable and adapted for the purpose, intended

Mr. John A. Paden

by the manufacturer, of the transportation of goods and tangible articles of commerce, whatever they may be."

Based on the Lasswell case, a former opinion of this office held that pick-up trucks were commercial motor vehicles. Attorney General's Opinion No. 97, dated December 24, 1959.

In view of the Lasswell case, it can clearly be seen that a pick-up truck fitted with a camper either by the manufacturer or by the individual owner is a commercial motor vehicle, provided the cabin can be removed and the truck retains the potential to be used in a commercial capacity.

The above quoted portions of the Lasswell case apply not only to pick-up trucks, but to any motor vehicle contemplated and intended by the manufacturer to be used in a commercial capacity; that is, designed to regularly carry freight and merchandise, or more than eight passengers.


The collector has the power to classify motor vehicles for the purpose of registration in relation to classifying any vehicle as a commercial motor vehicle. The collector may do so on the basis of use or design. The use of a motor vehicle is a question of fact that can be readily determined. The design of a motor vehicle shall be determined by the collector based upon the contemplation and intention of the manufacturer to use such motor vehicle for carrying freight, merchandise, or more than eight passengers. The decision of the collector shall be binding. (Section 301.070, RSMo 1959).

#### CONCLUSION

It is, therefore, the opinion of this office that the state collector of revenue has the power to classify as commercial motor vehicles, "campers", which are regularly used to haul freight, merchandise, or more than eight passengers, as well as motor vehicles that were intended and contemplated by the manufacturer to regularly carry freight, merchandise or more than eight passengers.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, J. Gordon Siddens.

Very truly yours,

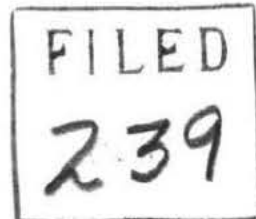
  
NORMAN H. ANDERSON  
Attorney General



INSURANCE: Articles of Incorporation of Founders Security Life Insurance Company.

OPINION NO. 239

June 1, 1965



Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

By letter dated May 20, 1965, you requested an opinion from this office as to whether documents submitted by Founders Security Life Insurance Company are in accordance with Chapter 376 of the statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consist of an executed copy of the Declaration of Intention of the original incorporators of Founders Security Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959 and a photographic copy of the Publisher's Affidavit as to publication of said Articles as required by Section 376.050 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959. In this regard, your attention is directed to Article IV of the proposed Articles of Incorporation which sets forth the rights and powers of the corporation to the extent not inconsistent with nor prohibited by the provisions of law applicable to life insurance companies. Paragraph (1) is as follows:

"To transact any lawful business in aid of the United States of America in the prosecution of war, make donations to associations and organizations, incorporated or unincorporated, which aid in war activities, and to lend money to the state and federal governments for war purposes;"

Honorable Robert D. Scharz

The recitation of corporate rights and powers in the cited provision is broader than that allowed by law under the provisions of Section 376.

Therefore, it is the opinion of this office that the proposed Articles of Incorporation are not in accordance with the provisions of Chapter 376 RSMo 1959.

Upon further examination, it is the opinion of this office that with the exception noted in the preceding paragraph, the documents submitted are in accordance with the provisions of Chapter 376 RSMo 1959, and are not inconsistent with the constitution and laws of this state and the United States.

The effect of the elimination of Article IV (1) from the proposed Articles of Incorporation will be to restrict the scope of the rights and powers to those permitted by law to life insurance companies. Therefore, an amendment striking Article IV (1) will not require republication of the Declaration of Intention.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:aa

INSURANCE: Articles of Incorporation of Central Investors Life  
Insurance Company

OPINION NO. 240

June 1, 1965



Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

By letter dated May 20, 1965, you requested an opinion from this office as to whether documents submitted by Central Investors Life Insurance Company are in accordance with Chapter 376 of the statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consist of an executed copy of the Declaration of Intention of the original incorporators of Central Investors Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959 and a photographic copy of the Publisher's Affidavit as to publication of said Articles as required by Section 376.050 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959. In this regard, your attention is directed to Article IV of the proposed Articles of Incorporation which sets forth the rights and powers of the corporation to the extent not inconsistent with nor prohibited by the provisions of law applicable to life insurance companies. Paragraph (1) is as follows:

"To transact any lawful business in aid of the United States of America in the prosecution of war, make donations to associations and organizations, incorporated or unincorporated, which aid in war activities, and to lend money to the state and federal governments for war purposes;"

Honorable Robert D. Scharz

The recitation of corporate rights and powers in the cited provision is broader than that allowed by law under the provisions of Section 376.

Therefore, it is the opinion of this office that the proposed Articles of Incorporation are not in accordance with the provisions of Chapter 376 RSMo 1959.

Upon further examination, it is the opinion of this office that with the exception noted in the preceding paragraph, the documents submitted are in accordance with the provisions of Chapter 376 RSMo 1959, and are not inconsistent with the constitution and laws of this state and the United States.

The effect of the elimination of Article IV (1) from the proposed Articles of Incorporation will be to restrict the scope of the rights and powers to those permitted by law to life insurance companies. Therefore, an amendment striking Article IV (1) will not require republication of the Declaration of Intention.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:aa

October 1, 1965

FILED  
241

Honorable Earl A. Bollinger  
Representative - Madison County  
Capitol Building  
Jefferson City, Missouri

Dear Representative Bollinger:

This is in answer to your request of May 25, 1965, for an opinion on the question of whether the Circuit Clerk and Ex-Officio Recorder of Deeds of Madison County must be paid compensation as allowed by Section 483.332, RSMo Cum Supp 1963, for the years 1959 to 1964. You subsequently advised this office by telephone that during the years in question the recorder had been furnishing a list as required by Section 137.117, RSMo 1959.

Section 483.332, supra, sets an annual compensation for a special duty of the clerk and makes one-twelfth of it payable each month. Section 483.332 reads as follows:

"For the performance of the duties imposed upon him by section 137.117, RSMo, the circuit clerk and ex officio recorder shall receive, in addition to all other compensation now allowed by law, the following annual compensation, payable out of the county treasury in monthly installments:

"(1) In counties where the assessed valuation is less than fifteen million dollars, seven hundred dollars;"

Under this statute the clerk is entitled to overdue compensation. Coleman v. Kansas City, 353 Mo. 150, 182 S.W. 2d 74. Also see Coleman v. Kansas City, Mo., 351, 254, 173 S.W. 2d 572; Coleman v. Kansas City, 348 Mo. 916, 156 S.W. 2d 644.



Honorable Earl A. Bollinger

However, Section 50.690, RSMo Cum Supp 1963, seems to preclude payment. Section 50.690 reads, in part, as follows:

"Every officer claiming any payment for salary or supplies shall furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year beginning January first and ending December thirty-first, and the sections of law under which he claims his office is entitled to the amount requested; \* \* \* No officer shall receive any salary or allowance for supplies until all the information required by this section has been furnished. \* \* \*"

Although not ruling directly on Section 50.690, the court in Gill v. Buchanan County, 346 Mo. 599, 142 S.W. 2d 665, dealt with the same problem. There the court held that the Budget Law does not preclude the county's obligation to pay salaries fixed by the Legislature. The court also held that the county officer was not estopped from recovering his salary by reason of his failure to budget for it.

It is our opinion that Gill v. Buchanan County, supra, controls here and the clerk is not precluded by Section 50.690, supra, from collecting his salary.

The question then is whether a statute of limitation applies.

Section 516.120, RSMo 1959, is the five year limitation statute and subsection (2) reads as follows:

"(2) An action upon a liability created by a statute other than a penalty or forfeiture;"

This five year limitation was applied in the Coleman case, 182 S.W. 2d 74, supra, where the Court had before it a statute with compensation similar to Section 483.332, supra. The statute in that case was the predecessor of Section 82.380, RSMo 1959. Section 82.380 sets a salary of a certain sum "a year, payable monthly." The court l.c. 78, said that:

Honorable Earl A. Bollinger

"The salaries were payable monthly and a right of action accrued to the employee at the end of each month."

The Court then quoted 34 Am. Jur., page 92, sec. 113, for the general proposition that:

"a cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time."

Each month the clerk had a cause of action for the prior month's compensation. Since the action is based upon a liability created by a statute, the five year period applies.

Also, this statute of limitations defense may not be waived. See enclosed Attorney General Opinion to the Honorable Rex A. Henson dated September 13, 1954.

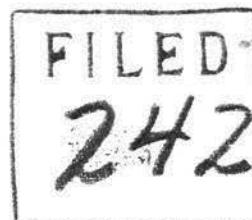
Therefore, it is our opinion that the Circuit Clerk and Ex-Officio Recorder of Deeds is entitled to back compensation under Section 483.332, RSMo Cum Supp 1963, subject to the five year statute of limitations set out by Section 516.120, RSMo 1959.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure: Opinion dated Sept. 13, 1954

July 1, 1965



Honorable John A. Callow  
State Representative  
Holt County  
Oregon, Missouri

Dear Representative Callow:

This is in answer to your request for an opinion of this office as to the rightful and legal ownership of the real estate known as Big Lake, a body of water located in Holt County, Missouri.

Big Lake is an oxbow lake and originally was part of the Missouri River. The water forming the lake was cut off from the river because of a change in its course. A history of the lake given us by the Missouri Conservation Commission indicates it was formed prior to June 19, 1862, the date of the Federal land survey. We have no information as to whether the lake was formed prior to 1821, the year in which Missouri was admitted to the Union.

As a general rule, when additional states are admitted into the Union, title to land under all navigable waters within such states is reserved by the individual states. But if the waters are not navigable in fact, the title of the United States to the land underlying them remains unaffected by the formation of the new state. United States v. Oregon, 295 U.S. 1, 79 L. Ed. 1267, 55 S. Ct. 610; 56 Am. Jur., Waters, Section 450-456.

Missouri has not relinquished its ownership of the land under navigable waters within the State to the riparian land-owners, but has retained title in itself. Conran v. Girvin, 341 S.W.2d 75. As the Missouri River has been held to be a navigable stream, Peterson v. City of St. Joseph, 156 S.W.2d 691, if Big Lake was cut off from the river subsequent to 1821, the date Missouri was admitted into the Union, or although completely isolated if the lake was "navigable" at that time, title to the land underlying such lake vested in the State. If the lake was formed prior to 1821 and the waters of the lake were not

navigable at the time of the admission of Missouri, title remained in the United States. See United States v. Oregon, supra.

In the latter case, the question of title to the lake bed would turn upon whether title has passed from the United States to the riparian landowners through Federal land grants, or to the State by Congressional grant. The resolution of this question would involve an extensive examination of the title of each riparian landowner to determine the extent of his ownership, if any, of the lake bed.

Even if it were possible for this office to ascertain the necessary facts, valid title to the lake bed could not be established other than by a final decision made by a court of competent jurisdiction upon consideration of all the evidence. For these reasons, we feel this office is not qualified to provide an opinion as to the title of the lands in question.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

June 22, 1965



Honorable Philip G. Hess  
Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri

Re: State vs. Arlie Bennett Williams

Dear Mr. Hess:

This is in response to your request for an opinion in the captioned cause.

The requested information concerns the language in which the indictment against the captioned individual should be couched to charge embezzlement, as follows:

"I would like to inquire whether or not the indictment can be couched in terms of the defendant stealing the total amount between the dates August 1st, 1963 and September 30, 1964."

We believe the decision of the Supreme Court of Missouri, En Banc, in the case of Tucker v. Kaiser, 176 S.W. 2d 622, to be a complete answer to the inquiry. It holds at page 625 as follows:

"The crime of embezzlement can be a continuing offense, as where the accused was in the continuous receipt of money at different times; and embezzled different sums at different times, in the aggregate amounting to the sum charged in the indictment. But even under a charge of that kind, although the State failed to prove the embezzlement of the whole sum, yet if it could show the embezzlement of a portion thereof, the charge



Honorable Philip G. Hess

-2-

would still be good. Time is not of the  
essence of such an offense; \* \* \*."

The embezzlement provisions have been incorporated in the  
new stealing statute (Section 560.156, RSMo 1959) and, therefore,  
all that is necessary is that the defendant be charged with steal-  
ing a certain amount of money over a certain period.

Very truly yours,

HLM:mje

NORMAN H. ANDERSON  
Attorney General

COUNTY COLLECTOR:  
SURETY BOND PREMIUMS:  
NON-LIABILITY OF COUNTY:

Cooper County, Missouri, is not  
liable for payment of premiums  
on surety bond of Collector of  
Revenue of said County for years  
1960 through 1964.

August 5, 1965

OPINION NO. 245

Honorable Richard J. Blanck  
Prosecuting Attorney  
Cooper County  
Booneville, Missouri



Dear Mr. Blanck:

This office is in receipt of your request for a legal opinion concerning the liability of Cooper County for premiums on the bond of County Collector, Earl D. Kirkpatrick for the years 1960 through 1964. The opinion request reads in part as follows:

"Mr. Kirkpatrick provides a Corporate Surety Bond and has made it his practice to pay the premium on the same during all of these years. He has now requested the County Court to pay these premiums. The cost of the premium has not been included in the budget for any of these years and the orders shown in the attached copy are the only orders entered in regard to the Collector's Bond.

\* \* \* \* \*

"I would like a determination of the following:

"1. Do the orders as shown on the attached copy constitute such consent and approval as is sufficient to require the County Court to pay the premium on the bond of the County Collector?

"2. If the orders are sufficient to compel payment of the premium, is the County Court authorized to pay these premiums for the years 1960 through 1964?

"3. Is it necessary that the premium be set out in the County Collectors budget in order to authorize payment of said premium by the County Court?"

Section 52.020 R.S.Mo Cum. Supp. 1963, requires a County Collector to give bond before entering upon the Duties of his office and reads in part as follows:

"1. Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of the city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of the amount; but no collector shall be required to give bond in excess of seven hundred and fifty thousand dollars. The bond shall be conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years constituting his term of office, and that he will in all things faithfully perform all the duties of the office of the collector according to law. \* \* \*"

Section 107.070 R.S.Mo 1959, provides when public officers may give surety bonds. Insofar as it refers to county officers, said section reads as follows:

"Whenever \* \* \* any officer of any county of this state, \* \* \* shall be required by law of this state, \* \* \* or by any order of any court in this state, to enter into any of-

ficial bond, or other bond, he may elect, with the consent and approval of the governing body of such \* \* \* county \* \* \* to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

From the factual situation here involved, it clearly appears the collector exercised his legal right of election to obtain a surety company bond, as provided by Section 107.070, but said factual situation does not indicate, nor has any claim been made that the County Court of Cooper County gave its consent and agreed to pay the premium of the collector's bond for any of the years in question. If such consent and approval have been given, then of necessity it would have to be by attached certified copies of County Court orders for the years 1960 through 1964, as these are the only court orders relating to the collector's bond. Said court orders read in part as follows:

"July 13, 1960

The County Court ordered that the following bond of Earl D. Kirkpatrick, duly appointed Collector of Revenue of Cooper County, Missouri, to replace Albert F. Blanck, who died on the 6th day of July 1960, be approved.  
\* \* \*

"March 6, 1961

\* \* \* Now on this day comes Earl D. Kirkpatrick, Collector, within and for Cooper County, Missouri, and presents to the Court his bond as Collector of the Revenue, which bond is hereto attached, for the two years next ensuing the first day of March, 1961. The Court after examining said bond, finds it is made in a sum equal to one-fourth of the largest total collections made during any one month of the year immediately preceding his election plus 10% said collections being \$650,309.34 for the month of December 1959. The Court further finds this bond to be signed by a sufficient number of

solvent and satisfactory sureties.

"It is further ordered said bond be approved and a duplicate thereof transmitted by the clerk of this Court to the Director of Revenue. \* \* \* "

"February 26, 1962

\* \* \* County Court ordered the above bond of Earl D. Kirkpatrick, County Collector be approved."

"February 27, 1963

\* \* \* County Court ordered the above bond of Earl D. Kirkpatrick, County Collector be approved."

"March 4, 1964

\* \* \* Now on this day comes Earl D. Kirkpatrick, Collector within and for Cooper County, Missouri, and presents to the Court his bond as Collector of Revenue, which said bond is hereto attached, for the four years next ensuing the first day of March, 1964. \* \* \* The Court further finds this bond to be signed by a sufficient number of solvent and satisfactory sureties. \* \* \* It is further ordered said bond be approved and a duplicate thereof be transmitted by the Clerk of this Court to the Director of Revenue."

"March 1, 1965

Now, at this day comes Earl D. Kirkpatrick, Collector within and for the Cooper County, ensuing the first day of March 1965. The Court after examining said bond, finds that it is made in a sum equal to one-fourth the largest total collections made during any one month of the year immediately preceding his election plus 10% said collections being month of December, 1960, in the amount of \$725,761.93. The Court further finds this bond to be signed by sufficient number of solvent and satisfactory sureties. \* \* \* "



"It is further ordered said bond be approved and a duplicate thereof be transmitted by the Clerk of this Court to the Director of Revenue."

From each of the above quoted County Court orders, it is noted that the Court merely approved the Collector's bond, and there was no "consent and approval" within the meaning of Section 107.070 supra, in any of such orders. Unless Cooper County had consented to the giving of a surety bond, and then had approved such bond, there would be no liability on the County to pay the premium of said bond, Boatright v. Saline County, 350 Mo., 945, 169 S.W. 2d 371; Cox v. Polk County, Mo., 173 S.W. 2d 680.

In the case of Berry v. Linn County, 355 Mo. 195, S.W. 2d 502, in construing the meaning of Section 3228, R.S.Mo 1939, (now Section 107.070 R.S.Mo 1959), the Court said at l.c. 503:

"[1] The intent of Section 3238 is clear. It provides when an officer chooses to give a surety company bond, the cost of it shall not be imposed on the county unless the county agrees.

"[2] A county court speaks only through its records. The only record we have here is the formal approval of the bond itself required by other statutes. There is no record showing the necessary authorization for Berry to give a surety company bond. Without such record the county may not be charged for the cost. Boatright v. Saline County, 350 Mo. 945, 169 S.W. 2d 371."

In view of the fact there was no "consent and approval" in any of the County Court orders referred to above, for the Collector of Revenue of Cooper County to obtain a surety company bond, and approval of the bond as such, it is our thought that Cooper County is not legally liable for payment of the premium on the Collector's surety bond, and our answer to the first inquiry is in the negative.

For the same reasons given for answering the preceding inquiry in the negative, our answer to the second inquiry is also in the negative.

Since negative answers have been given to the first and second inquiries, it is believed to be unnecessary to answer the third inquiry.

CONCLUSION

Therefore, it is the opinion of this office that Cooper County, Missouri, is not liable for payment of premiums on the surety bond of the Collector of Revenue of said county for the years 1960 through 1964.

The foregoing opinion which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL AMENDMENT: Ballot title for House Joint  
Resolution No. 11.

June 3, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: House Joint Resolution No. 11

Dear Mr. Kirkpatrick:

Pursuant to your request of May 26, 1965, and  
pursuant to the directive found in Section 125.030  
RSMo 1959, I submit the following ballot title in  
relation to the above subject:

To authorize cities, in addition  
to the existing power to lease,  
to dispose of plants for manu-  
facturing and industrial develop-  
ment purposes constructed from  
proceeds of revenue bonds.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

PROBATE COURT:  
STATE MENTAL HOSPITALS:  
INSANE PERSONS:

With respect to the commitment and hospitalization of the mentally ill, Sections 202.780 to 202.870, RSMo: (1) The probate court may order that commitment for hospitalization pursuant to Section 202.807 be to the Division of Mental Diseases; (2) The Division has authority under Section 202.823 to transfer an involuntary patient from one State hospital to another State hospital without the concurrence of the court ordering the hospitalization.

OPINION NO. 247

June 22, 1965

Honorable George A. Ulett, M.D.  
Director  
Division of Mental Diseases  
722 Jefferson Street  
P. O. Box 687  
Jefferson City, Missouri



7-20-65  
extra  
copies  
in  
vault

Dear Dr. Ulett:

This is in response to your opinion request which is as follows:

"With respect to Section 202.807, entitled 'Hospitalization on Court Order - Judicial Procedure', an opinion is requested as to whether or not the court may, upon completion of the hearing and a finding that the proposed patient is mentally ill, order that the patient be committed to the Division of Mental Diseases for 'hospitalization for an indeterminate period' or for a 'temporary observational period' or whether it is mandatory that the court specify in its order the particular place of hospitalization.

"Also, I would appreciate knowing whether Section 202.823, relative to the transfer of involuntary patients from one public hospital to another requires the concurrence of the court that committed the patient."

The sections you have cited pertain to the commitment and hospitalization of the mentally ill within the scope of Sections 202.780 RSMo 1959, to 202.870 RSMo 1959.

Section 202.807, RSMo 1959, contains the judicial procedure for involuntary hospitalization of mentally ill persons and provides in part:

Honorable George A. Ulett, M.D.

"5. If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient is mentally ill, and is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization, it shall order his hospitalization for an indeterminate period or for temporary observational period not exceeding six months; otherwise it shall dismiss the proceedings. If the order is for a temporary period the court at any time prior to the expiration of such period, on the basis of report by the head of the hospital and such further inquiry as it may deem appropriate, may order indeterminate hospitalization of the patient or dismissal of the proceedings. The order of hospitalization shall state whether the individual shall be detained for an indeterminate or for a temporary period and if for a temporary period, then for how long." (Emphasis ours.)

This authority given the probate court should be construed in light of the authority given the Division to transfer patients as provided by Section 202.823, RSMo 1959, as follows:

"1. The division may transfer, or authorize the transfer of an involuntary patient from one public hospital to another if the division determines that it would be consistent with the medical needs of the patient to do so. Whenever a patient is transferred, written notice thereof shall be given to his legal guardian, parents, and spouse, or, if none be known, the nearest known relative or friend. In all such transfers, due consideration shall be given to the relationship of the patient to his family, legal guardian or friends, so as to maintain relationships and encourage visits beneficial to the patient.

"2. Upon receipt of a certificate of an agency of the United States that facilities are available for the care or treatment of an individual heretofore ordered hospitalized pursuant to law or hereafter pursuant to section 202.807 in any hospital for care or treatment of the mentally ill and that such individual is eligible for care or treatment in a hospital or institution of such agency, the division may cause his transfer to such agency of the United States for hospitalization. Upon effecting any such transfer, the court ordering hospitalization, the legal guardian, spouse, and parents, or



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if none be known, his nearest known relative or friend shall be notified thereof immediately by the division. No person shall be transferred to an agency of the United States if he is confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of mental illness unless prior to transfer the court originally ordering confinement of such person enters an order for the transfer after appropriate motion and hearing. Any person transferred to an agency of the United States shall be deemed to be hospitalized by such agency pursuant to the original order of hospitalization."

It is noted that the word "hospitalization" is used throughout Section 202.807 (5) and this term in its usual sense would mean, as defined in Black's Law Dictionary, Fourth Edition (1951), "Placing a sick person in a hospital". It is obvious that no other meaning could be ascribed to the language or to the intent of the Legislature.

The term "hospital" is defined in Section 202.780, RSMo 1959, as "A public or private hospital or institution, or part thereof, equipped to provide inpatient care and treatment for the mentally ill." It appears, therefore, that the probate court may order the hospitalization in either a public or private hospital or institution. Section 202.807 (5) does not, however, require that the court designate a particular hospital and insofar as hospitalization within a facility under the control of the Division of Mental Diseases is concerned, the designation of a sole facility would not restrict the authority of the Division to transfer the patient as provided in Section 202.823, supra.

Section 202.823 clearly authorizes the "division" (defined in Section 202.780 as "the division of mental diseases"), to transfer or authorize the transfer of involuntary patients from one public hospital to another as the Division determines would be consistent with the medical needs of the patient. This section requires notice to certain interested persons and it is noteworthy that subsection 1 does not require notice to the court ordering hospitalization although subsection 2 in reference to a transfer by the "division" to an "agency of the United States", does require notice to the court ordering the hospitalization. The Division, therefore, is solely vested with the authority to transfer such patients from one State hospital to another State hospital and may do so without the concurrence of the probate court. It also follows that the probate court cannot restrict the commitment to a certain facility within the Division and, therefore, lacking such authority, Section 202.807 (5) authorizes the probate court to commit the patient to the Division of Mental Diseases for hospitalization.

Honorable George A. Ulett, M.D.

CONCLUSION

With respect to Sections 202.780 to 202.870, RSMo 1959, relating to the commitment and hospitalization of the mentally ill, it is the opinion of this office that:

(1) The probate court may order that commitment for hospitalization pursuant to Section 202.807, RSMo 1959, be to the Division of Mental Diseases, and such order need not specify that the patient be committed to a particular facility within the Division; (2) The Division of Mental Diseases has the authority under Section 202.823, RSMo 1959, to transfer or authorize the transfer of an involuntary patient committed under provisions of Section 202.807, RSMo 1959, from one State hospital to another State hospital without the concurrence of the court ordering hospitalization.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

June 29, 1965



Mr. Thomas L. David, Director  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. David:

This opinion is in response to your request of June 8, 1965,  
regarding the following:

"What is the meaning of the phrase passenger  
carrying vehicle as found in Section 304.555,  
RSMo \* \* \*"

Section 304.555, RSMo. 1963, Cum. Supp. provides:

"No four-wheeled passenger motor vehicle other  
than motorbuses manufactured or assembled after  
June 30, 1964, and designated as a 1965 or later  
year model, shall be sold or registered in this  
state unless it is equipped with at least two  
sets of seat safety belts for the front seat of  
the motor vehicle. \* \* \*"

The language of the statute limits seat belt requirements  
to four-wheel passenger motor vehicles--any motor vehicle that has  
more than four wheels whether it carries passengers or not would  
be required to have seat belts as required equipment.

The language of the statute requires all standard four wheel  
passenger carrying automobiles to be equipped with seat belts in  
the front seat.

The question arises with respect to a four wheel motor vehicle  
that is not designed specifically to carry passengers such as a  
pick-up truck.

In this type of motor vehicle, there is space and seating available for the carrying of passengers in the cab of the truck.

To construe the statute problem is not whether the vehicle can carry passengers, but whether the vehicle was designed specifically to carry freight or other merchandise.

Section 301.010, Subdivision [1], RSMo. 1959, relates to the registration and licensing of motor vehicles. The definition for a commercial motor vehicle in that statute is any motor vehicle that is designed or regularly used for carrying freight and merchandise or more than eight passengers. Pickup trucks or any other type of truck are under this classification.

In State v. Lasswell, 311 S.W.2d 356, the Supreme Court held "a commercial motor vehicle" as defined under Section 301.010 was a motor vehicle that was suitable and adaptable for the purpose. It was the purpose of the manufacturer who designed it that it be used for the transportation of goods and tangible articles of commerce, and a half ton pickup truck is a commercial motor vehicle under this Section. In that case, there was no evidence that the vehicle was even used to carry freight or articles of commerce. The vehicle involved was a Ford pickup truck with a cab and a small truck bed back of the cab. The Court said:

"Instant defendant, who runs a sawmill and makes hardwood flooring (in connection with which he operates a large 'tractor-trailer van' on which 32,000 to 34,000 pounds are hauled), argues that his Ford pickup was not adapted for use in hauling logs and hardwood flooring, and that the evidence showed only that he had carried in the bed of the pickup a spare tire and 'a bunch of tools,' such as might have been carried 'in the back end of my car.' But, defendant's argument loses sight of the fact that the determinative issue was not whether defendant's pickup actually had been used for carrying merchandise or whether the pickup was designed for use in hauling logs or hardwood flooring, but rather was whether his pickup was 'a motor vehicle designed \* \* \* for carrying freight and merchandise' [Section 301.010 (1)], i.e., whether it was suitable and adapted for the purpose, intended by the manufacturer, of the transportation of goods and tangible articles of commerce, whatever they might have been. Of course, the purpose to which we refer is the primary or dominant purpose, as distinguished from a secondary or incidental one. Thus, the fact that passengers may be, and in fact are, transported by a motor vehicle does not establish

its status as an automobile. For, '(a) large heavy duty truck has an even wider front seat and a larger bed behind the cab in which many passengers can be, and sometimes are transported; but if, for example, such a vehicle be used to transport a troop of Boy Scouts to camp, it does not for that reason become an automobile, as distinguished from a truck. On the other hand, if one hauls a ton of lead in the rear seat and rear trunk of his sedan from one location to another, the vehicle remains a sedan.' Roller v. Hartford Accident & Indemnity Co., 24 Wash. 2d 473, 166 P. 2d 173, 178."

The mere fact that passengers can be carried in a pickup truck does not make a pickup truck a passenger vehicle.

For these reasons, the statute under consideration requires seat belts only on motor vehicles manufactured primarily for use as passenger vehicles (other than motorbuses) as distinguished from freight carrying vehicles. This also applies to station wagons which are generally designed for the purpose of carrying passengers even though they may be used to carry certain types of goods. The fact that the owner may occasionally use a vehicle for some purpose other than its primary use is immaterial.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

BPS;lvd



November 4, 1965



Honorable John J. Johnson  
Senator - 15th District  
Capitol Building  
Jefferson City, Missouri

Dear Senator Johnson:

In your letter of June 7, 1965, you enclose a form of petition being circulated in St. Louis County seeking to incorporate a community in accordance with the statutes.

The petition is headed, "CITIZENS INCORPORATION COMMITTEE," and is in the following form:

"WE THE UNDERSIGNED TAXABLE INHABITANTS,  
DO HEREBY PETITION THE COUNTY COUNCIL OF  
THE COUNTY OF ST. LOUIS AND STATE OF MISSOURI FOR INCORPORATION AS A CITY OF THE  
FIRST CLASS TO BE KNOWN AS THE CITY OF  
AND ORGANIZED WITH A MAYOR,  
CITY COUNCIL FORM OF GOVERNMENT."

At the 1965 regular session of the Legislature an act was passed relating to the incorporation of cities in first class counties having a charter form of government and second class counties, wherein the provisions for incorporating an unincorporated area are set out.

Paragraphs 1 and 2 of Section 72.085, House Bill 98, 73rd General Assembly, which became effective October 13, 1965, are as follows:

"1. Other provisions of law notwithstanding any unincorporated area of land in any second class county or first class county having a charter form of government may become a city

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of the class to which its population would entitle it, as provided in this chapter, and be incorporated in the manner provided by this section.

"2. Incorporation proceeding may be instituted by the filing of a petition with the governing body of such county. The petition shall be signed by ten per cent of the registered voters in the area, shall describe by metes and bounds, the area to be incorporated and be accompanied by a plat thereof, shall state the approximate population and the assessed valuation of all real and personal property in the area and shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area, the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation is to become effective and whether or not the incorporation is in the interest of such county as a whole."

It is to be noted that Paragraph 2 contains the following requirements:

1. The petition shall be signed by ten per cent of the registered voters in the area;
2. It shall describe by metes and bounds the area to be incorporated and is to be accompanied by a plat of the area;
3. It shall state the approximate population and the assessed valuation of all real and personal property in the area;
4. It shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area;
5. It shall state the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation becomes effective;

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6. It shall state whether or not the incorporation is in the interests of the county as a whole.

Clearly, the petition referred to in your letter does not comply with the requirements as set forth above.

The revised ordinances of St. Louis County, Chapter 401, contain certain requirements for the incorporation of cities. We have been informed by Mr. Donald J. Stohr, St. Louis County Counselor that the provisions of this chapter which are inconsistent with the provisions of Section 72.085 will be repealed. If it is deemed necessary, provisions will be enacted in accordance with the terms of the above section.

We trust this is the information you desire and if we can be of further service to you do not hesitate to call upon us.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

OHS/sj

COUNTY COURTS: The county court has no authority under Chapter  
ROADS AND STREETS: 228, RSMo, to open as a county road a proposed  
ROADS: street which is entirely within the boundaries  
STREETS: of a fourth class city and is not part of a con-  
ROADS AND BRIDGES: tinuous county road.

OPINION NO. 253

September 22, 1965



Honorable James G. Lauderdale ✓  
Prosecuting Attorney  
Lafayette County Court House  
Lexington, Missouri

Dear Mr. Lauderdale:

This is in answer to your request for an opinion on an interpretation of Section 228.040, RSMo 1959. Your question reads as follows:

"Is the County Court without discretion to open a city street which is entirely within the corporate limits of a Fourth Class City and which street connects with an already established and existing county road, and where all other provisions of Chapter 228 have been complied with.

"In other words, the Court is asking if there is a difference between a 'road' and a 'street' and is there an exception to the duties imposed on the County Court under Section 228.040 or must the County Court without discretion, open and maintain the proposed new city street, which includes the building of a bridge entirely within the corporate limits of a Fourth Class City."

Subsequently you advised us by phone that although the street will connect with an established county road, the street is not part of an overall county plan. That is, the street is not a continuation of a county road running through the city to another destination but the street will run only to some point in the city.

Chapter 228, RSMo, provides a means for the establishment and vacation of public and private roads.

Section 228.040, RSMo 1959, the statute in question, reads as follows:

"When the petition required by section 228.020 is presented, and upon proof of notice having been given as required in section 228.030, if

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no remonstrance is filed and if the petitioners give the right of way for the proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by landowners through whose land the proposed road would run, the county court, without discretion to do otherwise, must open said road and thereupon the court shall proceed as in sections 228.010 to 228.190 provided in cases where upon a hearing the court find it necessary to establish a road."

Your letter says that all sections of Chapter 228, supra, have been complied with. If this were so then indeed the county court would have no discretion. The question, then, is whether the petition presented was authorized by Section 228.020, RSMo 1959.

Section 228.020, supra, in part reads as follows:

"Applications for the establishment of all public roads, except state roads, shall be made by petition to the county court. \* \* \*"

The question is whether "all public roads" means only county roads or whether it includes all streets within cities.

The court in Odom v. Hook, Mo. App., 177 SW 2d 165, was dealing with the vacation of a public road and said, l.c. 170, 171:

"That portion of Main Street in question was excluded in 1888, and obviously thereafter the character of the public right, vested in the county, was that of an easement to use that part of Main Street as a public road or highway. It was no longer a city street."

And, in speaking of the predecessor of Section 228.190, RSMo 1959, the court said, l.c. 171:

"\* \* \* and Sec. 8485 thereof provides that 'nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same.' The above quoted clause has been accorded independent meaning and effect and it is said to apply to any public road. Johnson v. Rasmus, 237 Mo. 586, 141 S.W. 590. \* \* \* The law as there declared applies to the loss of an easement in any public highway other than city streets, \* \* \*"

Section 88.670, RSMo 1959, grants certain powers to fourth class cities and says in part:



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"1. The cities coming under the provisions of sections 88.667 to 88.773, in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law:

\* \* \*

"(2) To open and improve streets, avenues, alleys and other highways, \* \* \*

"3. Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city."

Thus, streets are the business of the cities and roads are the business of the counties. However, that does not say that all public thoroughfares within cities are in all respects streets.

The court in State ex rel. Clay County v. Hackmann, 270 Mo. 658, 195 SW 706, said this, l.c. 709:

"Was the purpose and intent of the constitutional amendment and subsequent legislative enactments, in enabling the raising of such large funds for the purpose of building an improved county system of connected modern roads, to provide only for improving rural roads, and to make no provision for providing funds for insuring an equally good improvement upon those small connecting links of road lying within the incorporated towns or cities along the routes of those cross-county roads? Or was it the intention that provision should be made for raising funds for a uniform connected system of improved highways so that the same might (if conditions required) be made free from small stretches of mudholes or unimproved roadways where the same passed through such towns and cities? That the latter intention is certainly consistent with the purposes sought to be subserved is, we think, very apparent. \* \* \*"

The continuous road concept expressed in the Hackmann case, supra, is now set out in Section 108.120, RSMo 1959, which reads in part as follows:

"\* \* \* Such funds may be used in the construction, reconstruction, improvement, maintenance and repair of any street, avenue, road or alley in any incorporated city, town or village if such street, avenue, road or alley or any part thereof shall form a part of a continuous road, highway, bridge or culvert of said county leading into or through such city, town or village."

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The predecessor of Section 108.120, supra, and the Hackmann case, supra, were discussed in Kroeger v. St. Louis County, 358 Mo. 929, 218 SW 2d 118, where the court said, l.c. 120:

"There can be no doubt that a county does have the power in the construction or improvement of any road between two given points in the county to make a street in an incorporated city, when such street is a part of the county highway system under section 8608, supra."

In the case at hand the proposed street is just that, a street. It will serve a municipal purpose and is not part of a continuous county road plan.

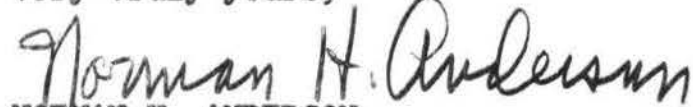
Therefore, it is our opinion that the proposed street is not a public road as intended by Section 228.020, supra. This being so, it is not a question of the county court having discretion under Section 228.040, supra, but simply that the county court has no authority to open the proposed street.

#### CONCLUSION

It is the opinion of this office that the county court has no authority under Chapter 228, RSMo, to open as a county road a proposed street which is entirely within the boundaries of a fourth class city and is not part of a continuous county road.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

COUNTY OPTION DUMPING  
GROUND LAW:  
NOTICE:  
HEARING:

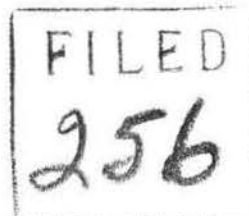
If published as described in Section 64.550, RSMo 1959, in at least one newspaper having general circulation within the county, and if posted fifteen days in advance of the hearing, in at least four conspicuous places in each township.

The county court must make a reasonable effort to hear arguments and evidence, pro and con, on the adoption the County Dumping Ground ordinance. The county court, in its discretion exercised in a reasonable manner may control and limit such presentation.

OPINION NO. 256

December 21, 1965

Honorable Lon J. Levvis  
Prosecuting Attorney  
Audrain County Courthouse  
Mexico, Missouri



Dear Mr. Levvis:

This is in response to your request for an opinion of this office, reading as follows:

"Our County Court wishes to bring our county under the county option dumping ground laws. Section 64.483 provides that this law 'shall not be operative in any county until the county court, after notice and hearing by order entered of record, so orders.'

"I have read the other sections of this law, and it appears that nowhere does it specify the kind of notice that shall be given or the kind of hearing that shall be had.

"Will you please let me have your opinion as to the kinds of notice and hearing that are necessary to make this law operative in our county?"

Section 64.483, RSMo 1959, states as follows:

"Sections 64.460 to 64.487 shall not be operative in any county until the county

Honorable Lon J. Levvis

court, after notice and hearing, by order entered of record, so orders."

While the statute does not describe the character of notice, the situation is such as to require the giving of a reasonable notice of some description. Thomson v. Tafel, Ky., 218 S.W.2d 977. The form and contents of a notice required by a statute are dependent on the wording of the statute construed in the light of the subject matter. Hunter v. Harlan, 34 N.E.2d 467. Where a statute requires notice to be given but does not specify the length of time, it will be construed as a reasonable length of time. People v. Frost, 32 Ill. App. 242; Burden v. Stein, 25 Ala. 455, 66 C.J.S.

Reasonable notice is such notice or information as may generally and properly be expected or required in the particular circumstances.

Reasonable notice was also defined in Baker v. Baker, Mo.App., 274 S.W.2d 322, 1.c. 326, as follows:

"Since the requirement imposed by 'reasonable notice' is flexible and pliable, not rigid and unyielding [Kleinschmidt v. Hocht, 361 Mo. 29 233 S.W.2d 649; Padberg v. Padberg, Mo.App., 78 S.W.2d 555, 559], definition of the term 'reasonable notice' in precise, delimiting and restrictive language is neither appropriate nor desirable. 'Reasonable notice' has been said to be 'such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances' [Black's Law Dictionary 4th Ed., p. 1211; Sterling Mfg. Co. v. Hough, 49 Neb. 618, 68 N.W. 1019, 1020] or, in even more general language, 'notice "suitable to the case"' [Commonwealth ex rel. McIver v. Central Dist. Telephone Co., 243 Pa. 586, 90 A. 338, 340 (2)]. And, in considering whether the requirement of 'reasonable notice' has been satisfied in a wide variety of situations, our courts have held uniformly over a long period of years that whether 'reasonable notice' has been given in any particular case depends upon, and must be determined in the light of the facts of that case . . . ."

Reasonable notice in the instant case would be sufficient if it properly advises the citizens of your county as to the hearing held in accordance with Section 64.483.

The Legislature failed to prescribe the exact character of the notice to be given in this situation; however, they did prescribe the precise notice to be given for two other situations

Honorable Lon J. Levvis

dealing with the functions of county government.

Such notice is described in Section 64.550, RSMo 1959, as follows:

" \* \* \* notice of the time and place of which [hearing] shall be published in at least one newspaper having general circulation within the county, and notice of such hearing shall also be posted at least fifteen days in advance thereof in at least four conspicuous places in each township. \* \* \* "

The above notice is incorporated by reference into Section 64.640, RSMo 1959. Since the Legislature has deemed this notice to be sufficient in two other instances dealing with matters of county government, such notice would be adequate and reasonable, but possibly not necessary, in the instant case.

As to the requirements of the hearing, it is important to note that the hearing required by Section 64.483, RSMo 1959, is not an adversary proceeding. It is simply a matter of whether a law is to become effective in a county. The county court, as an administrative agency of the county, conducts the hearing as an administrative proceeding. " . . . under the [Constitution] county courts are no longer 'courts' in a juridical sense, but are ministerial bodies managing the county's business, with certain taxing and districting power. . . ." Bradford v. Phelps County, Mo., 210 S.W.2d 996, 1.c. 999. (Emphasis added)

"No particular form of procedure is required to constitute due process in administrative proceedings . . . . The cardinal test of the presence or absence of due process of law in an administrative proceeding is the presence or absence of rudiments of fair play long known to the law . . . ." 16A C.J.S. 851.

Fair play dictates that the hearing be conducted in an orderly manner, and that the county court provide reasonable opportunity for proponents and/or opponents of the Dumping Ground ordinance to be heard. However, the court has the power to limit such presentation.

"A large amount of discretion in the conduct of a hearing is necessarily reposed in the administrative body or the person conducting the hearing , . . ." 73 C.J.S. Section 136, 1.c. 461.



Honorable Lon J. Levvis

The foregoing C.J.S. citations were incorporated by the Kansas City Court of Appeals, into that court's decision in an adversary proceeding (Jones v. State Department of Public Health and Welfare, Mo. App., 354 S.W.2d 37), indicating that the "fair-play" requirement of administrative proceeding is acceptable in Missouri.

#### CONCLUSION

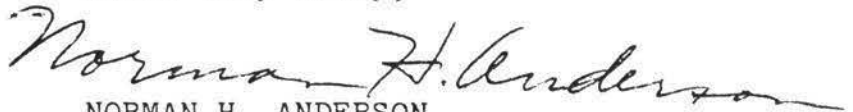
Therefore, based on the foregoing authority, it is the opinion of this office that:

(1) Notice of the hearing pursuant to Section 64.483, RSMo 1959, would be sufficient if published as described in Section 64.550, RSMo 1959, in at least one newspaper having general circulation within the county, and if posted fifteen days in advance of the hearing in at least four conspicuous places in each township.

(2) The county court must make a reasonable effort to hear arguments and evidence, pro and con, on the adoption of the County Dumping Ground Ordinance. The county court in its discretion, exercised in a reasonable manner, may control and limit such presentation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Gordon Siddens.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

August 31, 1965



Honorable Paul McGhee  
Prosecuting Attorney Stoddard County  
16 North Elm Street  
Dexter, Missouri 63841

Dear Mr. McGhee:

This letter is in answer to your request for an opinion of this office on three questions concerning Section 229.180 et seq. RSMo. Your first question is whether the measurement of the 200 feet mentioned in the statutes commences at the edge of the ordinarily traveled portion of the road or at the edge of the right-of-way of the road. Said section 229.180 reads as follows:

"No auto wrecking yard or junk yard shall be established, maintained or operated within two hundred feet of any state or county road in this state, unless such auto wrecking yard or junk yard is screened from said road by tight board or other screen fence not less than ten feet high, or of sufficient height to screen the wrecked or disabled automobiles or junk kept therein from the view of persons using such road on foot or in vehicles in the ordinary manner; provided, that nothing in this section shall apply to any auto wrecking yards, or junk yard located in any town, village, or city."  
(emphasis supplied)

Sections 229.190 and 229.200 RSMo make violations of Section 229.180 a misdemeanor and provide for punishment for such violation.

Honorable Paul McGhee

The term "road" is ordinarily defined as the traveled or improved portion of the ground used for travel by pedestrians and vehicles, 37A "Words and Phrases", 503. In the case of State ex rel. vs. Public Service Commission, Mo., 100 SW2d 522, 1.c. pages 525 and 526, the Missouri Supreme Court stated, "A road or a highway is nothing more than a strip of ground set aside, improved and dedicated to the public for use as a passageway." It is clear from the context of Section 229.180, supra, that the term "road" as used therein means the traveled portion of such strip of ground.

It is our view that the cited statute uses the term "road" in its commonly understood application, so that the statute prohibits the maintenance of a junkyard within 200 feet of the edge of the traveled portion of a road.

Further, Section 229.180 is a penal statute, and should therefore be strictly construed against the State. Borden Company v. Thomason, Mo., 353 SW2d 735.

Your second question is whether a police officer can legally enter upon the premises of a junkyard to measure the distance to a road without the consent of the owner of the premises.

The law does not require a search warrant or special permission for an officer to enter a place of business to which the public is invited. 79 C.J.S., Searches and Seizures, Section 65, p. 829. While lawfully upon the premises, an officer would not be violating any rights of the owner by taking measurements.

The court stated in Application of Zerga, Petitioner, 218 F.Supp. 759, 761 (U.S.Dist. Court, N.Y., 1963):

"[2] The propriety of the officers' entry into the candy store was well established. The store was a public place. The events took place in broad daylight, shortly before noon, apparently during normal business hours. This is shown by the easy access of the four unknown males and of the officers. It is clear that the premises were open to the public, and there is neither claim nor evidence to the contrary. Moreover, the

Honorable Paul McGhee

officers entered in good faith to investigate further, not, as petitioners urge, to arrest and search. Patrolman Kennelly intended to arrest only if the circumstances, disclosed by the investigation, warranted it."

Your third question is whether an injunction suit, brought by the prosecuting attorney against persons maintaining and operating junkyards in violation of the above statutes will lie. We enclose a copy of the opinion of the Attorney General, dated February 14, 1964, to Charles P. Moll, which addresses itself to this inquiry.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj/aa

Enclosure

Opinion No. 260

June 22, 1965

Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

By letter dated June 15, 1965, you requested an opinion from this office as to whether documents submitted by National Pilot Life Insurance Company are in accordance with Chapter 376 of the statutes and are not inconsistent with the constitution and laws of this State and the United States. These documents consist of an executed copy of the Declaration of Intention of the original incorporators of National Pilot Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959 and a copy of the Publisher's Affidavit as to publication of said Articles as required by Section 376.050 RSMo 1959.

Upon an examination of the documents referred to in the preceding paragraph, as required by Section 376.070 RSMo 1959, it is the opinion of this office that the same are found to be in accordance with the provisions of Chapter 376 RSMo 1959 and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

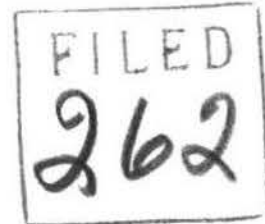
Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosures



September 28, 1965



Honorable Alfred A. Speer  
Representative, 12th District  
St. Louis County  
101 South Meramec  
Clayton 5, Missouri

Dear Representative Speer:

This letter is in response to your question arising from the proposed consolidation of the City of Glendale and Oakland. You submitted the following facts and question set out below in a statement to a member of this office:

Two Fourth Class cities in St. Louis County Glendale and Oakland, are contemplating initiating a merger to become one Fourth Class city by means of an ordinance prepared by their respective city councils and submitted to the voters of each city pursuant to Chapter 72, V.A.M.S. Present plans provide for Oakland, which now has 3 wards, to become one ward of the consolidated city. The question is whether under this arrangement all of the present officers of both cities could be retained on an interim basis until elections are held in the consolidated city next spring.

The consolidation of cities is governed by Chapter 72, R.S.Mo. Section 72.155, R.S.Mo. Supp. 1963 with which we are concerned provides as follows:

"1. Consolidation of municipalities may be instituted by the governing bodies of any cities, towns or villages, or any combination thereof, by ordinance, adopted by the governing bodies of the respective municipalities. The ordinance shall contain the following:

"(1) The names of the municipalities to be consolidated;

"(2) The proposed effective date of consolidation;

"(3) The number of votes cast in the last municipal election.

"2. The ordinance may contain the name of the municipality as consolidated, the form of government to be adopted and the details of transition, such as which officers will serve, which employees shall be retained, what taxes will be collected, what ordinances will be in effect and similar matters for the operation of the consolidated municipality until the new governing body provides otherwise.

"3. The adopted ordinance shall then be filed with the county court in the same manner as provided for initiative petitions in Section 72.167."

(Emphasis ours.)

Chapter 79, R.S.Mo., is that portion of the statutes that deals with the organization of Fourth Class cities. The pertinent statutes are set forth hereafter. Section 79.050, R.S.Mo. Supp., 1963, provides as follows:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified."

Section 79.060, R.S.Mo., provides in part for the Board of Aldermen and is as follows:

"The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, \* \* \* \* \*."

Section 79.230, R.S.Mo., provides for the following officers:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner."

The best guide to construing statutes is to first seek the lawmakers intention for the whole act and, if possible, to effectuate that act (Kirkwood Drug Company vs. City of Kirkwood 387 SW 2d 550) Statutes, in para materia, should be construed together and harmonized insofar as it is reasonably possible (Garrad v. St. Department of Public Health and Welfare 375 SW 2d 582).

It is our view that Chapter 72 on consolidation of cities should be construed so that when consolidation has been effected that the newly consolidated city shall have only those officers specified by statutes.

This opinion assumes that the respective cities involved will comply fully with Section 72.155 V.A.M.S., et. seq. That is to say, that the cities will provide for "which officers will serve", etc. The ordinance (providing for consolidation under the statutes) should provide, among others, for the selection of a mayor, two aldermen from each ward, etc., (Section 79.050, 79.060 V.A.M.S.). Therefore, it is the conclusion of this office that only one mayor and two aldermen from each

ward can be provided by the ordinance providing for consolidation. Specifically, on the facts stated above, Oakland (which will become one ward in the newly consolidated city) can only have two aldermen. Your question as stated above must be answered in the negative.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

RCA:am

INSURANCE: Articles of Incorporation of Central Investors Life Insurance Company.

Opinion No. 267

June 29, 1965

Honorable James P. Dalton  
Chief Counsel, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Dalton:

On May 20, 1965, the Superintendent of the Division of Insurance submitted for examination by this office an executed copy of the Declaration of Intention of the original incorporators of Central Investors Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959, and a photostatic copy of the Publisher's Affidavit as to publication of said Articles as required by Section 376.050 RSMo 1959. You requested an opinion as to whether the documents were in accordance with Chapter 376 of the statutes and not inconsistent with the constitution and laws of this state or the United States.

On June 1, 1965, this office issued its opinion concluding that Article IV, paragraph (1) of the proposed Articles of Incorporation was not in accordance with the provisions of Chapter 376 RSMo 1959. The opinion further concluded that with the exception noted the documents submitted are in accordance with the provisions of Chapter 376 RSMo 1959 and not inconsistent with the constitution or the laws of this state or the United States.

By a letter dated June 23, 1965, you have resubmitted for our examination the proposed Articles of Incorporation of Founders Security Life Insurance Company.

Article IV, paragraph (1) referred to above has been deleted from the proposed Articles. It is the opinion of this office that the proposed Articles of Incorporation of Founders Security Life Insurance Company are in accordance with the



provisions of Chapter 376 RSMo 1959 and are not inconsistent with the constitution and laws of this state or the United States.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

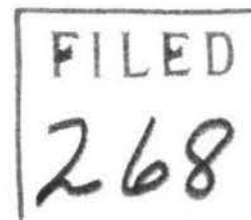
Very truly yours,

NORMAN H. ANDERSON  
Attorney General

INSURANCE: Articles of Incorporation of Founders Security Life Insurance Company.

Opinion No. 268

June 29, 1965



Honorable James P. Dalton  
Chief Counsel, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Dalton:

On May 20, 1965, the Superintendent of the Division of Insurance submitted for examination by this office an executed copy of the Declaration of Intention of the original incorporators of Founders Security Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959, and a photostatic copy of the Publisher's Affidavit as to publication of said Articles as required by Section 376.050 RSMo 1959. You requested an opinion as to whether the documents were in accordance with Chapter 376 of the statutes and not inconsistent with the constitution and laws of this state or the United States.

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provisions of Chapter 376 RSMo 1959 and are not inconsistent with the constitution and laws of this state or the United States.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

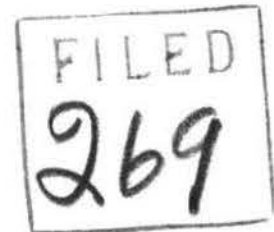
NORMAN H. ANDERSON  
Attorney General

PROBATE COURTS: Section 202.807 RSMo 1959, in respect to judicial proceedings for hospitalization of the  
WITNESSES: mentally ill, does not require that the physician be physically present at the hearing.  
MENTALLY ILL: Evidence in affidavit form meets the requirements of the statute if all parties to whom notice is required to be given expressly agree and the Court concurs. Without complete agreement of the parties and the Court, the evidence of the physician must be adduced by deposition or by his oral testimony at the hearing.

OPINION NO. 269

September 28, 1965

Honorable Bill Burlison  
Prosecuting Attorney  
Cape Girardeau County  
708 Broadway  
Cape Girardeau, Missouri



Dear Mr. Burlison:

This is in response to your request for an opinion of this office in reference to Section 202.807 RSMo 1959 relating to judicial procedure for hospitalization of the mentally ill.

Your question is as follows:

"The statute above referred to states in part:  
'At least one of the witnesses at the hearing shall be a licensed and reputable physician. . .'

"The question is whether this statute means that the physician must be in actual presence at the hearing or whether an affidavit of the physician would suffice."

Section 202.807 states in part:

"2. Upon receipt of an application the court shall give notice thereof, and of the time of hearing thereon, to the proposed patient, and to his legal guardian or, if he has no legal guardian, to his spouse, parent or nearest known relative or friend.

"3. The proposed patient, the applicant, and all other persons to whom notice is

Honorable Bill Burlison

required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court in its discretion may receive the testimony of any other person. The proposed patient shall not be required to be present. At least one of the witnesses at the hearing shall be a licensed and reputable physician who has examined the individual within twenty days prior to the hearing. If an order of hospitalization is made, such medical witness shall make out a detailed history of the case, as far as practicable, stating the diagnosis or nature of the mental illness, its duration, former treatment of the patient, and all other particulars relating to the patient, and his disease on forms acceptable to the division of mental diseases. Such history shall be attached to the order of hospitalization to be delivered to the hospital. The court in its discretion may order further examination as to the mental condition of the proposed patient and may continue the hearing until the report of such further examination is made to the court."

In phrasing this section it was recognized that historically for a judicial determination as to the sanity and appointment of a guardian the legislature did not undertake to regulate the quantum or the quality of proof. The quality and sufficiency of the evidence to make a case has been considered to be a court function as long as the alleged incompetent was guaranteed a hearing by a court of record and there was felt to be no reason why the Legislature should spell out in great detail the evidence and procedure necessary for an adjudication and commitment to a state hospital. The due process requirements were recognized as met by notice and opportunity to defend.

"The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights are denied, we are governed by the substance of things and not mere form." *Simon v. Craft*, 182 U.S. 427, 1.c. 436 (1901).



Honorable Bill Burlison

It appears therefore that at least basically, as far as due process is concerned, the requirement that one of the witnesses be a physician is not a prerequisite. The question remains, however, whether or not the Legislature in enacting Section 202.807 undertook to make the physical presence of the physician a substantive evidentiary element without which the hearing would lack validity.

This section, however, does not undertake to define the term "witness" which is a generally descriptive term and does not necessarily import physical presence in the court. It seems reasonable to conclude that the Legislature intended solely that testimony of or evidence by a physician be required in order to reach a proper adjudication.

Section 202.807, paragraph 2, requires notice to the proposed patient and to other specified persons. Section 202.807, paragraph 3, requires that the proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, and to testify, and to present and cross-examine witnesses, and that the court in its discretion may receive the testimony of any other person. Likewise, it appears inherently within the province of the court to personally cross-examine such witnesses.

We recognize the application of the Rules of Civil Procedure relating to the taking of depositions and note that Rule 57.29 provides that depositions taken in conformity with the Rules under certain circumstances may be read and used as evidence in the cause in which they were taken, as if the witnesses were present and examined in open court on the trial thereof. Rule 57.29 (b) (5) authorizes reading of the deposition of a physician engaged in the discharge of his official or professional duties at the time of the trial.

Notice and opportunity to defend are basic to due process and may not be waived by the alleged mentally ill person or by his attorney. Section 202.807, paragraph 4, provides that the court shall not be bound by the rules of evidence and that an opportunity to be represented by counsel shall be afforded to every person alleged to be mentally ill and if neither he nor others provide counsel, the court shall appoint counsel. Such counsel may follow his professional discretion insofar as the conduct of the trial is concerned and as noted in *In Re Moynihan*, 62 S.W. 2d 410, 332 Mo. 1022, (1933), this provision is designed to allow counsel to enforce the rights of one who is unable to do it for himself.

Honorable Bill Burlison

It would appear therefore that the forensic discretion of counsel for the allegedly ill person would encompass a right of determination respecting the acceptance into evidence, of an affidavit by the physician. In this respect we believe the following quotation from 2 C.J.S. Affidavits #28a(2) to be a correct statement of the law:

"In the absence of an authorizing statute or rule of court, ex parte affidavits may not be read in evidence in the determination of material issues of fact, although they are part of the files in the case; such matters are to be proved or controverted by the testimony of competent witnesses taken at the trial or by deposition, so as to permit cross-examination; but the impropriety of such a course may be waived expressly or by failure object, and when waived, the one who waived it cannot thereafter take advantage of it. \* \* \* "

Whether or not such affidavit should be admitted into evidence would however be dependent upon the concurrence of all the required parties and the Court. By such concurrence or stipulation therefore the affiant physician may have his testimony heard at the hearing and meet the evidentiary requirements of the statute. We are strengthened in this conclusion by the reflection that the Legislature could have made it patently clear if they intended that nothing less than the personal physical presence of the physician would suffice.

It is obvious however that the Court or any party to whom notice is required to be given may require the physician to present oral testimony either at the hearing or by deposition.

#### CONCLUSION

It is the opinion of this office that Section 202.807 RSMo 1959, in respect to judicial proceedings for hospitalization of the mentally ill, does not require that the physician be physically present at the hearing. Evidence in affidavit form meets the requirements of the statute if all parties to whom notice is required to be given expressly agree and the Court concurs. Without complete agreement of the parties and

Honorable Bill Burlison

the Court, the evidence of the physician must be adduced by deposition or by his oral testimony at the hearing.

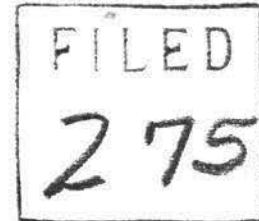
The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL AMENDMENT: Ballot title for Conference Committee  
Substitute for House Joint Resolution  
No. 48

June 29, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: Conference Committee Substitute for House Joint  
Resolution No. 48

Dear Mr. Kirkpatrick:

Pursuant to your request of June 28, 1965, and pursuant to the directive found in Section 125.030, RSMo 1959, I submit the following ballot title in relation to the above subject:

Repeal seven Sections of Article III and  
adopt 5 new Sections which provides:

168 members of the House of Representatives to be elected from districts. Apportionment shall follow each decennial census with certain exceptions. House to be reapportioned by law. The Senate shall consist of 34 members elected from districts of contiguous territory fixed by Senatorial Apportionment Commission. The House of Representatives cannot employ more than 225 nor the Senate more than 100 employees.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

AGRICULTURE: ECONOMIC POISONS  
ECONOMIC POISONS:

Disinfectants and antiseptics for  
use on the body of living animals  
for medicinal purposes are not  
economic poisons.

Opinion No. 276

October 29, 1965

Mr. Julius R. Anderson  
State Entomologist  
Department of Agriculture  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Anderson:

Reference is made to your request for an official opinion from this office as to whether a product entitled "Wound Dressing Bomb", produced by Veterinary Laboratories, Inc., must be registered as an economic poison pursuant to Section 263.300 RSMo 1959. The "Wound Dressing Bomb" is described on its label as follows: "For external Veterinary use only. A germicidal, fungicidal, anti-septic and protective wound dressing. To be used for minor wire cuts, galls, scratches and other superficial surface wounds. Also an aid in drying up cowpox lesions, moist eczema and in controlling secondary infections."

The following statutory definitions are relevant to this question: Section 263.270 (1):

"The term 'economic poison' means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the Commissioner, after a hearing, shall declare to be a pest;"

Section 263.270 (8):

"The term 'fungi' means all non-chlorophyll-bearing thallophytes (that is, all non-chlorophyll-bearing plants of a lower order than mosses and liverworts) as, for example, rusts, smuts, mildews, molds, yeasts, and bacteria, except those on or in living man or other animals;"



Mr. Julius R. Anderson

The Commissioner of Agriculture has promulgated regulations for the administration of the Economic Poisons Act and Regulation No. 1-A (b) provides in part as follows:

"Fungicide -- 'fungicide' includes, but is not limited to:

\* \* \* \* \*

"(2) disinfectants, antiseptics, and sterilizers, except those for use only on or in living man or other animals."

The Commissioner of Agriculture has also issued interpretations in regard to substances included in the definition of economic poison. Interpretation No. 1 provides as follows:

" \* \* \* Some specific examples of products which will not be considered economic poisons within the meaning of the act are:

\* \* \* \* \*

"2. disinfectants for use on or in the living body of man or other animals,"

A consideration of the provisions of the Economic Poisons Act in its entirety reflects an intention by the legislature to supervise, regulate and control products used for the eradication and control of noxious weeds, plant diseases, insects, rodents and similar pests. The act does not indicate an intention to include within its provisions medicinal products for treatment of man or animals. Thus, the inclusion of substances for preventing, destroying and mitigating viruses in the definition of economic poison (263.270 [1]) specifically excepts substances for preventing destroying and mitigating viruses on or in living man or other animals. The conclusion is inescapable that the legislation contemplated plant viruses and viruses on premises which may be eliminated by fumigation or other processes. Furthermore, reference to the definition of fungi in Section 263.270 (8), carefully excepts bacteria, etc., on or in living man or other animals. In administering the act, the Commissioner has recognized the non-medicinal nature of economic poisons in Regulation No. 1-A, by stating that fungicides do not include disinfectants, antiseptics and sterilizers for use on or in living man or other animals, and the Commissioner's Interpretation No. 1 specifically excepts such disinfectants as economic poisons.


Mr. Julius R. Anderson

CONCLUSION

It is the opinion of this office that the "Wound Dressing Bomb" produced by Veterinary Laboratories, Inc., is a disinfectant or antiseptic for use on the body of living animals for medicinal purposes and is not an economic poison.

The foregoing opinion which I hereby approve was prepared by my assistant, Thomas J. Downey.

Very truly yours,

A handwritten signature in cursive script that reads "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General

July 21, 1965



Mr. Francis O'Brien  
Attorney at Law  
1111 Title Guaranty Building  
706 Chestnut Street  
St. Louis, Missouri

Dear Francis:

In reply to your recent inquiry on the proper conduct of the August 17, 1965, election for the City of St. Louis, Missouri, the problems presented by your letter have been carefully considered by this Office. The issues, of course, arise from the redistricting of the City of St. Louis by the Board of Aldermen.

This Office has recently received the legal opinion expressed by the Office of the City Counselor of St. Louis dated July 12, 1965, on the same subject.

Inasmuch as this Office has reached substantially the same opinions and the same result, it is not necessary for us to write an extended brief on this matter in reply to your request.

Our legal conclusions expressed herein are based solely on the facts as you have presented them to us in your letter, and the conclusions are limited to the matters expressed in the opinion and not to be applied to other situations that could arise in the future.

In view of the fact that you state that it is impossible for you to establish new precincts and appoint judges and clerks for such precincts before the special election, August 17, 1965, called to vote on constitutional amendments, it is our view that the Board of Election Commissioners may conduct the election using the present precincts in St. Louis City and the election judges and clerks previously appointed by the Board for such precincts may serve at such special election, August 17, 1965.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

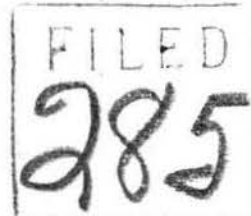
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STATE RECORDS ACT:  
UNIVERSITY OF MISSOURI:  
PUBLIC RECORDS:

House Bill No. 294 does not apply to the  
University of Missouri.

OPINION NO. 285

September 14, 1965



Honorable James C. Kirkpatrick ✓  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Kirkpatrick:

This is in response to your letter of July 9, 1965, in which you inquire whether House Bill No. 294, enacted by the 73rd General Assembly and known as "State Records Act" applies to the University of Missouri.

In substance this act provides for a state records commission to be composed of the Secretary of State, Attorney General, State Auditor, a member of the House of Representatives, and a member of the Senate. The Secretary of State is authorized to establish a records management and archives service and to appoint a director with authority to establish procedures and techniques for the preparation, management, retention and disposal of State records subject to the approval of the commission. It authorizes the commission to determine what records no longer have any administrative, legal, research, or historical value and should be destroyed or otherwise disposed of. It prohibits the destruction of any such records without the approval of the commission.

Article IX, Section 9 (a), Constitution of Missouri 1945, reads as follows:

"State university--government by board of curators--number and appointment.--The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

In an opinion issued on January 29, 1934, to Orville M. Barnett, Attorney General McKittrick considered the applicability of the State Purchasing Act (now Section 34.01 et. seq.) to the University of Missouri and ruled that the constitutional provision, supra, prevented the State Purchasing Act from applying to the University of Missouri. A copy of this opinion is attached hereto.

In an opinion issued by this office on December 19, 1955, to DeVere Joslin, Attorney General Dalton ruled that the board of curators of the University of Missouri has legislative authority to invest the funds in its hands derived from sources other than appropriations made by the General Assembly and that the statutes pertaining to the deposit of State funds have no application. A copy of this opinion is hereto attached.



Honorable James C. Kirkpatrick

In an opinion issued by this office on April 18, 1962, to June R. Rose, Chairman, Attorney General Eagleton ruled that the prevailing wage law (Section 290.210 through 290.310) has no application to the University of Missouri. A copy of this opinion is also attached.

It must be observed that in these opinions much stress was given to the word "government" as used in the above constitutional provision. It appears that under this constitutional provision the power to govern the University of Missouri is vested in the board of curators of the University and that the Legislature is without authority to interfere.

The keeping of the records at the University of Missouri would be a vital part of the government of the University and determining what records should be made and kept by the University are matters of government of the University and beyond the power of the Legislature to control.

#### CONCLUSION

It is the opinion of this office that provisions of House Bill No. 294, 73rd General Assembly, known as the "State Records Act" do not apply to the University of Missouri.

Very truly yours,

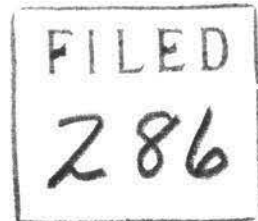
  
NORMAN H. ANDERSON  
Attorney General

Enclosures (3)



CONSTITUTIONAL AMENDMENT: Ballot title for House Joint  
Resolution No. 26

July 15, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: House Joint Resolution No. 26

Dear Mr. Kirkpatrick:

Pursuant to your request of July 8, 1965, and pursuant to the directive found in Section 125.030, RSMo 1959, I submit the following ballot title in relation to the above subject:

Authorizes school districts formed of cities and towns including St. Louis City School District to levy a property tax at a rate not in excess of \$1.25 per \$100 valuation.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

NOTARY PUBLIC: County Clerk to certify copies of the  
Notary Public's appointment under Senate  
Bill No. 259

Opinion No. 287

September 29, 1965

The Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

Recently you requested an opinion from this office as follows:

"Senate Bill No. 259 which passed the General Assembly and has been signed by the Governor provides that an appointed Notary Public may, in addition to performing the duties of his office in his home county and adjoining counties, also act in an official capacity 'in any or all other counties of the state in which he has previously filed a certified copy of his appointment with the county clerk of that county.'

"The question has now arisen as to the proper person to prepare the certification to be filed with the county clerk of the county in which he performs such official acts.

"Is the certification to be prepared by the county clerk of his home county, who finally delivers the Notary Public Commission, or is it the duty of the Secretary of State who prepares the Commission at the authorization by the Governor?

"For your convenience we are attaching a copy of Senate Bill No. 259 and will appreciate your advices in this matter."

Section 486.010, RSMo 1959, authorizes a notary public to perform the duties of his office in the county for which such notary is appointed and in adjoining counties. Senate Bill No. 259, 73rd General Assembly, amends said section to provide:

Honorable James C. Kirkpatrick

" \* \* \* and in any or all other counties of the state in which he has previously filed a certified copy of his appointment with the county clerk of that county. \* \* \* "

The question you have submitted relates to who should certify the appointment. This act becomes effective October 13, 1965.

Section 486.070, RSMo 1959, provides in part that whenever a commission is issued to any person as a notary public, the Secretary of State shall forward such commission to the county clerk and, in the City of St. Louis, to the circuit clerk who shall not deliver the commission until such person shall give bond and take and subscribe to the oath of office as required by Section 486.050.

Section 486.050, RSMo 1959, provides:

"Every notary, before entering upon the discharge of the duties of his office, shall take the oath of office, which shall be indorsed on his commission, shall give bond to the state in the sum of two thousand dollars, except in counties of the first class, in which they shall give bond in the sum of five thousand dollars, with at least two good and sufficient sureties, to be approved by the clerk of the county court (in the city of St. Louis such approval shall be by the clerk of the circuit court), which commission, oath and bond shall be filed and recorded in the office of said county clerk, and in the city of St. Louis in the office of the circuit clerk. Said bond, after having been so recorded, shall be filed in the office of the secretary of state, and may be sued on by any person injured; but no suit shall be instituted against any such notary or his sureties more than three years after such cause of action accrued. Sureties on the bond of any notary may be discharged from all future liability on such official bond, by petition in writing addressed to the county court (in the city of St. Louis to the circuit court), by conforming to the requirements, with the same rights and remedies as provided by sections 433.140 to 433.220, RSMo, relating to sureties."

Honorable James C. Kirkpatrick

Section 486.060, RSMo 1959, provides:

"On the written statement of any citizen, verified by oath, that the bond of any notary has become or is insufficient, said county clerk, and in the city of St. Louis the circuit clerk, shall cite such notary to appear before him, and to give a new and sufficient bond. If said clerk shall find his bond to be insufficient, he shall order a new bond to be given, and if such new and sufficient bond shall not be given within ten days after said order, such notary public shall forfeit his office, and thereafter cease to exercise the powers and duties thereof."

Section 51.140, RSMo 1959, provides in part that the county clerk shall have power and is authorized to administer oaths and affirmations in all matters and proceedings incident to the exercise of the powers and duties of his office and incident to the powers and proceedings of the county court and when required, shall affix his jurat and seal of the county court of which he is clerk.

Before a notary public enters upon the discharge of his official duties, he must indorse his oath on the commission, give bond subject to the approval of the county clerk and he must file his commission, oath and bond with said clerk where it is there recorded by the clerk. After the bond is recorded by the county clerk, it is to be returned to the Secretary of State to be filed therewith. Under Section 486.060, supra, it is possible that a notary may have forfeited his office for failure to comply with the order of the county clerk to file a new bond. Assuming that the county clerk has proceeded against a notary under the above statute and that the notary has forfeited his office for failure to comply with the orders of the county clerk, there is not statute requiring the county clerk to notify the Governor or the Secretary of State of this fact; only the records of the county court would reveal this fact.

While the Legislature did not clearly spell out who is authorized to issue certified copies of the "appointment", yet considering all of these duties placed upon the county clerk and the fact that the notary's public commission has to be filed and recorded in the office of the county clerk as well as the other powers vested in the county clerk, we believe the Legislature in Senate Bill No. 259 intended and impliedly authorized the county clerk of the county where the original commission is filed, to prepare the certified copies of the appointment provided for in Senate Bill No. 259.


Honorable James C. Kirkpatrick

CONCLUSION

It is the opinion of this office that it is the duty of the county clerk of the county where the original commission of a notary public is filed and recorded, to prepare certified copies of said appointment to be filed in any or all other counties of the state in which county or counties he may perform the duties of a notary public. This law is effective October 13, 1965.

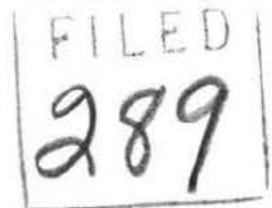
This opinion which was prepared by my assistant, Mr. Moody Mansur, is hereby approved by me.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



October 6, 1965



Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Mr. Burrell:

This letter is in response to your request dated July 9, 1965, relating to the interpretation of Chapter 416. You have stated the problem as follows:

"The problem for which I would like your opinion arises from the fact that there is a small grocery corporation in our county that gets together weekly on an informal basis with four other small grocery stores for the purpose of joint advertising. They use a trade name linking themselves together in what appears to be a single entity doing business at several locations. They then decide what items in their stores to advertise and at which price. Each of the individual owners then sells these particular items at the price advertised in accordance with the ad.

The attorney for one of these stores has requested my opinion as to whether this activity is in violation of Chapter 416 RSMo 1959, and as to whether any person would be making a false affidavit by submitting the anti-trust affidavit as required in Section 416.200."

\* \* \* \* \*

"The second question is whether these stores would be in violation of Chapter 416 if they entered into a written agreement concerning these same activities."

Honorable Don E. Burrell

This office in Opinion No. 42 dated December 11, 1961, to John A. Honssinger, copy of which is herewith enclosed, held that a price fixing agreement involving retail filling stations violates Chapter 416 of the Missouri Antitrust Laws.

The particular section of the statute relating to price fixing, Section 416.020 RSMo 1959, is in part as follows:

"Any person who shall \* \* \* enter into, become a member of or participate in any \* \* \* agreement \* \* \* or understanding with any other person or persons to \* \* \* fix the price of any article of manufacture \* \* \* merchandise, commodity \* \* \* or any article or thing whatsoever of any class or kind bought and sold \* \* \* shall be deemed and adjudged guilty of a conspiracy in restraint of trade \* \* \*"

This statute plainly prohibits any agreement or understanding to fix the price of an article of merchandise. Agreement to do so constitutes a per se violation of this statute. The vital words in our view are agreement or understanding to fix prices.

As we understand the facts the participants agree among themselves upon a joint ad to sell certain articles at a certain price as specified in the ad. Even if evidence of such an agreement or understanding were not available the ad itself would be very persuasive evidence of an agreement to fix the price of the articles so jointly advertised. It would follow that if Section 416.020 is violated then Section 416.200 would be violated if such an affidavit were made.

It makes no difference whether the agreement or understanding is oral or written.

The Missouri cases cited in the enclosed opinion make clear the meaning of this statute. In addition there are many federal cases dealing with a closely analogous section of the Sherman Act which consistently hold that agreements to fix prices of merchandise violates the law.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JGS/ms/aa

SCHOOLS:  
PUBLIC SCHOOL RETIRE-  
MENT SYSTEM:  
RETIREMENT:  
PENSIONS:

1.) A member of a teachers' retirement system of this State who meets the requirements for retirement contained in the statutes particularly applicable to that system, i.e., as though Section 169.570(1), RSMo 1959, had never been enacted, is eligible to receive a retirement allowance from that system although employed in a position covered by one of the other systems;

2.) Conversely, a member of a teachers' retirement system of this State who cannot qualify for retirement without reliance upon the additional rights granted by Section 169.570(1) is not eligible for a retirement allowance under the earlier system under which he was employed until, and only if, he becomes eligible for service retirement under the system in which he is last employed (except those having previously retired on disability become eligible upon reaching retirement age.)

October 21, 1965

OPINION NO. 292

Mr. G. L. Donahoe  
Executive Secretary  
Public School Retirement  
System of Missouri  
801 Jefferson Building  
Jefferson City, Missouri 65102



Dear Mr. Donahoe:

This opinion is rendered in response to your request for an official ruling.

You inquire:

"Assume that a member of the Public School Retirement System of Missouri has creditable service necessary to receive a service retirement allowance; that thereafter the member ceases to be employed in a district in our system and accepts employment in either the Kansas City or St. Louis teachers retirement system; and that before or after leaving our system the person attains a retirement age as prescribed for our system. Is that person entitled to a retirement allowance from our system while continuing in employment under one of the other systems? Especially do we inquire as to the effect of the provisions of Section 169.570 RSMo."

Mr. G. L. Donahoe

The legislature has established at different times, three retirement systems for teachers in this State. Each system is a separate body corporate. Sections 169.010 - 169.130 RSMo, apply to the State system. Sections 169.270 - 169.400 apply to the Kansas City retirement system. Sections 169.410 - 169.540 apply to the St. Louis retirement system. (Sections 169.140 - 169.260, RSMo 1959, provide for retirement systems in school districts having a population of 75,000-150,000. No such retirement systems exist in fact. This opinion does not consider or rule upon legal rights under such a system.)

We are not aware of any statute which expressly prohibits receiving a retirement allowance from one system while being employed in a position covered by another of the systems.

In a prior opinion (Opinion No. 24, Donahoe, 5-29-52) this office ruled that a retirement allowance is payable to a member of the State system only during actual retirement, i.e., actual separation from the teaching service. The circumstance considered in Opinion 24 was that of a member of the State system being eligible for retirement but continuing in an employment covered by the State system.

Since the State, Kansas City, and St. Louis systems are separate and independent, we are of the opinion that the case here is distinguishable from that of Opinion 24. McBride v. Retirement Board of Allegheny Co., 199 A. 130, relied upon in Opinion 24 supports this distinction. The court in McBride held that an employee retired under the system of one political subdivision did not waive his retirement allowance by becoming employed by the State.

You inquire especially as to the effect of Section 169.570 where a teacher seeks to retire under one system while continuing in an employment covered by another system.

Section 169.570 provides in part:

"1. An employee having five or more years of membership service under one of the Missouri retirement systems as provided by sections 169.010 to 169.130, 169.270 to 169.400 or 169.410 to 169.540, who is subsequently employed in a position covered by another of said Missouri retirement systems, may leave his contributions with the system under which he was first employed and be eligible to receive a benefit based upon his services under that system when he becomes eligible for a service

Mr. G. L. Donahoe

retirement benefit from another of said Missouri retirement systems or upon having reached retirement age having previously retired on disability. In event the member does not become eligible for a retirement benefit he shall be entitled to a refund of his contributions with interest upon demand, or to such other benefits as may be provided by law."

The short answer to your question is: If a member of one of the teachers' retirement systems meets the requirements for retirement contained in the statutes particularly applicable to that system (Sections 169.010 - 169.130 as to the State system), as though Section 169.570 had never been enacted, then he is eligible to receive his retirement allowance although presently employed in a position covered by one of the other teacher's retirement systems of this State. Conversely, if he is not qualified for retirement without relying upon the additional rights granted by Section 169.570, then he is not entitled to a retirement allowance under any system until he becomes eligible for service retirement under the system in which he is last employed.

We interpret Section 169.570 (1) as enacted for the purpose of permitting teachers to preserve membership in one system upon leaving that system for an employment covered by one of the other systems. This obviously is to allow Missouri teachers to seek employment anywhere in the State without jeopardizing their retirement rights.

Some hypothetical case illustrations:

1. A member of the State system retires under the State system. Thereafter, he takes an employment not covered by the State system. He is entitled to receive his retirement allowance from the State system while continuing the employment. Section 169.060(2) RSMo.
2. A member of the State system has 20 years creditable service but before reaching retirement age leaves the State system for an employment not covered by the State system. Upon reaching retirement age he is eligible to receive a retirement allowance although continuing in the employment. Section 169.070(6) gives a member with 20 years creditable service the right to keep his membership although not employed in a position covered by the system.
3. A member of the State system has more than five but less than 20 years creditable service and leaves the State system before retirement age for employment not covered by the State system. He reaches a retirement age within four years of leaving the State system. Upon reaching a retirement age he is eligible to receive a retirement allowance although continuing in the employment.



Mr. G. L. Donahoe, Executive Secy

Section 169.050(5) provides:

"5. Membership shall be terminated by failure of a member to be a public school employee under this system for more than four of any five consecutive years, by death, withdrawal of contributions, or retirement based on either age or disability."

The answer in the three above illustrations is the same whether the subsequent employment is covered by the Kansas City or St. Louis system or is an employment not covered by any Missouri retirement system.

4. A member of the State system has more than five but less than twenty years creditable service and leaves the system prior to retirement age. He does not reach a retirement age until more than four years after leaving. If after leaving the State system he is subsequently employed in a position covered by the Kansas City or St. Louis system, he is eligible to receive a retirement allowance from the State system only if and when he becomes eligible for retirement from the later system. Section 169.570(1). If, after leaving the State system he is not subsequently employed in a position covered by the Kansas City or St. Louis system, his membership in the State system terminates after an absence of more than four of five consecutive years. Section 169.050(5).

The answers to each of the above illustrations are comparably applicable to members of the Kansas City or St. Louis system who subsequently come under the State system; except of course, the membership service and retirement age figures to the particular system considered would have to be changed in each illustration.

#### CONCLUSION

Therefore, it is the opinion of this office that:

1.) A member of a teachers' retirement system of this State who meets the requirements for retirement contained in the statutes particularly applicable to that system, i.e., as though Section 169.570(1), RSMo 1959, had never been enacted, is eligible to receive a retirement allowance from that system although employed in a position covered by one of the other systems;

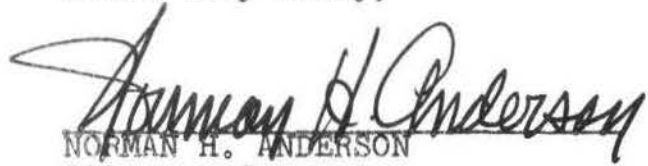
2.) Conversely, a member of a teachers' retirement system of this State who cannot qualify for retirement is not eligible for a retirement allowance under the earlier system under which he was employed until, and only if, he becomes eligible for service

Mr. G. L. Donahoe

retirement under the system in which he is last employed (except those having previously retired on disability become eligible upon reaching retirement age).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. Defeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL AMENDMENT: Ballot title for House Committee  
Substitute for House Joint Resolutions  
5 and 15

July 14, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: House Committee Substitute for House Joint  
Resolutions Nos. 5 and 15

Dear Mr. Kirkpatrick:

Pursuant to your request of June 17, 1965, and pursuant  
to the directive found in Section 125.030, RSMo 1959, I  
submit the following ballot title in relation to the above  
subject:

Authorizes first class counties to provide  
death benefits, pensions and retirement  
plans for salaried employees, their widows  
and minor children; authorizes legislature  
to permit any city, county or other political  
subdivision or corporation, to provide for  
retirement and pensioning of their officers  
and employees and their widows and minor  
children.

Yours very truly,

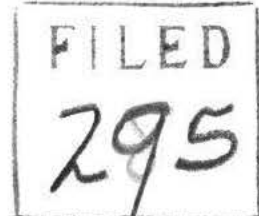
NORMAN H. ANDERSON  
Attorney General

INSURANCE: Articles of Incorporation of the Congressional  
Life Insurance Company

OPINION NO. 295  
295

July 14, 1965

Honorable Robert D. Scharz  
Superintendent  
Division of Insurance  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. Scharz:

By letter dated July 6, 1965, you requested an opinion from this office as to whether documents submitted by the Congressional Life Insurance Company are in accordance with Chapter 376 of the Statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consisted of an executed copy of the Declaration of Intention of the original incorporators of the Congressional Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and a photo copy of the Publisher's Affidavit as to publication of said Articles as required by Chapter 376.050, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that these documents are in accordance with the provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this state and the United States.

It is noted that Article III (f) of the proposed Articles of Incorporation refers to "contracts or reinsurance". It is assumed that "contracts of reinsurance" is intended. It is also noted that Article VIII and the Affidavit on Page 8, of the proposed Articles of Incorporation, recites Earl McHenry and Stafford Sheldon as being corporators. However, the signatures on Pages 7 and 8 reflect the names of Earl M. Henry and R. Sheldon Stafford respectively. It is assumed that the

Honorable Robert D. Scharz

signatures correctly reflect the names of these corporators. The discrepancies noted should be brought to the attention of the proposed company and corrections made to your files.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

NORMAN H. ANDERSON



CRIMINAL LAW:  
FINES AND PENALTIES:  
PENALTIES AND FINES:  
MOTOR CARRIERS:  
PUBLIC SERVICE COMMISSION:

Opinion No. 296 answered by  
letter. (Downey)

August 24, 1965



Honorable Richard E. Snider  
Assistant Prosecuting Attorney  
Cape Girardeau County  
P. O. Box 430  
Cape Girardeau, Missouri

Dear Mr. Snider:

Reference is made to your letter of July 14, 1965, requesting the official opinion of this office as to the applicability of the penalty provisions of Section 390.176 (1), RSMo 1959, to misdemeanor violations by motor carriers of the provisions of Chapter 304 RSMo 1959. An opinion of this office upon a question closely related to the one which you have raised was issued on November 10, 1960, to Mr. Ike Skelton, Jr., Prosecuting Attorney of Lafayette County. A copy of this opinion is enclosed.

The penalties applicable to motor carriers by Section 390.176 refer to the penalty actions available to the Public Service Commission provided for by Section 390.156. These penalty actions are civil actions although such proceedings are quasi criminal in nature. A judgment entered against a motor carrier in such proceedings is not a criminal conviction upon a misdemeanor charge. Any such judgment imposes a civil penalty as opposed to a criminal fine.

The imposition of fines upon misdemeanor convictions arising from charges based upon the provisions of Chapter 304 is made pursuant to the specific provisions of that chapter. For example, specific fines are provided for by Sections 304.-026, 304.110, 304.240 and 304.540. Section 304.570 is a catch-all provision which provides for fines applicable to Chapter 304 generally where punishment is not otherwise provided.

Honorable Richard E. Snider

Page 2

It is my opinion that Section 390.176 (1), RSMo 1959, does not provide fines as punishment for misdemeanor violations by motor carriers arising under the provisions of Chapter 304 RSMo 1959.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:aa

Enclosure 1

CONSTITUTIONAL AMENDMENT: Ballot Title for Senate Joint  
Resolution No. 10

July 21, 1965



Honorable James E. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri

Re: Senate Joint Resolution No. 10

Dear Mr. Kirkpatrick:

Pursuant to your request of July 15, 1965, and pursuant to the directive found in Section 125.030, RSMo 1959, I submit the following ballot title in relation to the above subject:

"Permits legislature to authorize a county with Charter form of Government to provide pensions for police and fire department members and their widows and minor children."

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JGS/ms

November 4, 1965



Honorable Glennon T. Moran  
Supervisor  
Department of Liquor Control  
State of Missouri  
Jefferson City, Missouri 65102

Dear Mr. Moran:

This is in response to your request for an opinion on the question of whether it is a violation of the State Statutes for minors in their employment to sack and carry out groceries containing alcoholic beverages.

The applicable statute is Section 311.300, RSMo 1959, which reads as follows:

"No person under the age of twenty-one years shall sell or assist in the sale or dispensing of intoxicating liquor."

Enclosed is Attorney General Opinion, dated August 14, 1943, to Michael W. O'Hern. This opinion held that minors may not be employed to make deliveries of liquor because there would be a dispensing of liquor. This opinion was given on the situation where liquor was purchased from drug stores over the telephone and minors would then deliver the liquor.

In your situation you advised us that the vendee would select the liquor, carry it to the checkout counter and an adult clerk would ring up the sale. Then, the minor would, along with groceries, put the liquor in a bag and carry the bag to the vendee's car. Also, of course, the vendor is a grocery store with an original package license.

As in the O'Hern opinion, there would be no sale or assisting in the sale by a minor because when the minor first comes in contact with the liquor the sale has been completed.

Honorable Glennon T. Moran

The question, then, is whether the minor was assisting in the dispensing of intoxicating liquor. The O'Hern opinion broadly construes the word "dispense" as used in the liquor laws to include delivery by the minor. We recognize that under the facts stated it does not present a situation where there is likely to be any harm flow from minors carrying liquor along with groceries. Yet if the word "dispense" is given a restricted meaning in its application to these facts, then where to draw the line or give a realistic restricted meaning to the word "dispense" under other facts becomes very difficult if not impossible. It is our opinion that the O'Hern opinion applies to your situation and the minor would be assisting in dispensing intoxicating liquor by carrying any intoxicating liquor to a customer's car.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

Enclosure: 1

WN:aa



MORTGAGES:  
CHATTEL MORTGAGES:  
RECORDERS:  
COUNTY RECORDERS:  
UNIFORM COMMERCIAL CODE:  
FEES, COMPENSATION AND SALARIES:  
FEES:

A recorder of deeds should accept for filing or recording a chattel mortgage on motor vehicles executed prior to July 1, 1965, when presented for filing or recording after such date if the fees payable for filing or recording such chattel mortgage prior to July 1, 1965, are tendered for such filing or recording.

Opinion Nos. 301 and 305

August 16, 1965

Honorable Allen S. Parish  
Prosecuting Attorney of Saline County  
Court House  
Marshall, Missouri

Dear Mr. Parish:

This is in answer to your letter of recent date in which you ask for an official opinion from this office concerning the duties of county recorders insofar as chattel mortgages are concerned. Your question is:

Should the recorder of deeds accept for filing or recording chattel mortgages on motor vehicles executed before July 1, 1965, and presented for filing or recording after such date and if so, what fees should be charged for such filing or recording.

Sections 443.480 to 443.520, R.S.Mo., relating to chattel mortgages were repealed by Senate Bill No. 241 of the 73rd General Assembly as of July 1, 1965.

The provisions so repealed provided that chattel mortgages were required to be filed or recorded in the office of the recorder of deeds to be valid against third parties. Fees were provided for such filing or recording.

Senate Bill No. 149 of the 73rd General Assembly, effective July 1, 1965, provides for perfecting liens on motor vehicles by recording on the title by the Director of Revenue.



Section 10--102 (2) Senate Bill No. 241 of the 73rd General Assembly provides as follows:

"(2) Transactions validly entered into before the effective date specified in Section 10-101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred."

Under such Section it may be held by the Courts of this State that the provisions of law which authorized filing and recording of chattel mortgages and the charging of fees for such filing and recording prior to July 1, 1965, are still applicable to chattel mortgages on motor vehicles executed prior to July 1, 1965, and presented for filing or recording on or after July 1, 1965.

The recorder of deeds is not required to determine the legal effect of Section 10-102 (2) of Senate Bill No. 241.

It is, therefore, our view that the recorder of deeds should accept for filing or recording chattel mortgages on motor vehicles executed before July 1, 1965, and presented for filing or recording after such date upon tender of the fees provided for such filing or recording prior to July 1, 1965.

The act of the recorder of deeds in accepting chattel mortgages on motor vehicles for filing or recording which were executed before July 1, 1965, and presented for filing or recording after such date does not in any way determine the validity of such filings or recordings or whether such filing or recording constitutes notice to third parties of a chattel mortgage or any other legal effect or result of such filing or recording.

#### CONCLUSION

It is the opinion of this office that a recorder of deeds should accept for filing or recording a chattel mortgage on motor vehicles executed prior to July 1, 1965, when presented for filing or recording after such date if the fees payable for filing or recording such chattel mortgage prior to July 1, 1965, are tendered for such filing or recording.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in cursive script, reading "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name and title.

NORMAN H. ANDERSON  
Attorney General

July 14, 1965



Honorable Warren E. Hearnest  
Governor of the State of Missouri  
Capitol Building  
Jefferson City, Missouri

Dear Governor Hearnest:

You have sent us a letter dated June 22, 1965, addressed to Mr. Eugene P. Walsh, your Legal Assistant, received from Mr. Dwight Beals, a lawyer in Kansas City.

The letter from Mr. Beals states that it is his view that nominations to fill the vacancy in the office of the State Senate caused by the resignation of Senator Bondurant can be made only by petitions and not by party political committees and that the writ of election must set the date of the election at least eighty-five days after the issuance of the writ.

You have asked for our views regarding the contentions made in Mr. Beals' letter.

It is our view that nominations can be made to fill the vacancy in the State Senate due to Senator Bondurant's resignation both by political committees and both by petitions. It is further our view that it is not necessary that the election date be eighty-five days after the issuance of the writ.

We are enclosing official opinions of this office rendered under date of September 6, 1955, to Honorable William E. Tipton, September 29, 1955, to Honorable John R. Clark and June 13, 1961, to Honorable Edward Speiser. We believe that these opinions set forth the applicable law as stated above. You will note that the two 1955 opinions have been withdrawn. However, the holding of such opinions as to the proper time of an election to fill a vacancy in the State Senate and the method of nominating candidates at such election was not withdrawn. The reason for the withdrawal of the 1955 opinions is that such opinions held that

nominations to fill a vacancy in the office of the State Senate could not be made by nominating petitions where the date of the election set in the writ ordering the election was insufficient to allow candidates to file nominating petitions under applicable statutory provisions.

The enclosed opinion to Mr. Speiser holds that such statutory provisions are directory only and that candidates may be nominated by petitions for special elections even though such statutes purport to prohibit filing petitions for nominations during the period between the issuance of the writ of election and the date of election.

As stated above, the 1955 opinions are correct, insofar as, they hold that nominations to fill a vacancy in the State Senate at a special election may be made by the senatorial committees of the various political parties and under the holding in the 1961 opinion, nominations may also be made by nominating petitions.

Respectfully submitted,

NORMAN H. ANDERSON  
Attorney General

By  
C. B. Burns, Jr.  
Assistant Attorney General

CBB:fms

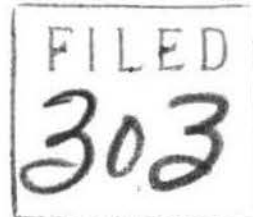
Encl:

cc: Mr. Dwight Beals, Suite 603 Commerce Building  
Kansas City 6, Missouri



September 28, 1965

Honorable Don D. Davis  
State Representative  
Webster County  
Niangua, Missouri



Dear Mr. Davis:

This letter is in reply to your inquiry as to whether the Public Administrator can use the office furnished him in the Court House by the county to transact his private insurance business.

You stated in your letter that he devotes "full time in this office operating this insurance business \* \* \* but the Public Administrator in a county of the size has practically no duties". You stated further that his business is advertised and his telephone (which this office has learned he pays for) is listed at his office in the Court House. It is assumed from your letter that such private activities of the Public Administrator do not interfere with the performance of his duties nor interfere with other public officials in the Court House in the exercise of their public functions or you would have stated that fact.

Any opinion which is rendered by this office must necessarily be limited by the ambit of the facts that you submit.

Under Section 49.270, V.A.M.S., the County Court has control and management of the county property, real or personal, belonging to the county. It has been held by the Supreme Court that the county court in the exercise of such control of public property, i.e., the Court House, has power to summarily expel intruders. The court went on to further rule that where a person has possession by consent or as an officer he should be notified of the County Court's intention to evict him and have a reasonable time to leave, otherwise the individual court members may be liable (Sparks vs. Purdy, et. al., 11 Mo 142, 144).

The test to determine if a use of public properties is improper is whether such use is inconsistent with, or substantially or materially interferes with, the use of the property for the particular purpose to which it is dedicated. Any use that exceeds the measure set out above constitutes a misuser or diversion (O'Dell vs. Pile, et. al., 260 SW 2d, 521, 525).

Honorable Don D. Davis

Thus, the issue involved is whether the Public Administrator has so misused the office furnished him as to constitute a misuser or diversion within the meaning of the term as defined in the O'Dell case (supra). Obviously, a public officer who may occasionally or casually transact private business in his office would not violate the spirit or letter of the law. On the other hand, where a public officer transacts his private business affairs from his court house office on a day to day basis, the question presented becomes one of fact, where all aspects and circumstances involved need to be considered by the County Court.

The mere fact that the Public Administrator engages in private business in addition to his duties of Public Administrator does not itself constitute the basis for objection to the Public Administrator engaging in private business. The Public Administrator, as a matter of fact, may engage in private business during the usual business hours or personally devote such time as he deems proper to his private business when such activity does not interfere with the faithful performance of his duties. (See State ex rel Cumpton 240 S.W. 2d 877, 885) Certainly, there may be times when the Public Administrator can properly discuss insurance business with his clients subject to the limitations set out in O'Dell vs. Pile (supra). The question must be measured in terms of reasonableness and by the application of good judgment.

Based on the limited facts submitted, this office is unable to reach a conclusion as a matter of law that the acts of the Public Administrator constitute a misuser or diversion of public property.

It is the view of this office that: (1) public buildings such as court houses should be used to conduct public affairs; and (2) that public officers may conduct their private business affairs from the offices in the Court House provided such use shall not be inconsistent with, or substantially or materially interfere with, the use of the property for the particular purpose for which it is dedicated. The practice of soliciting insurance or conducting any private business affairs from the Court House must be measured and tested by the application of reason and good judgment.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

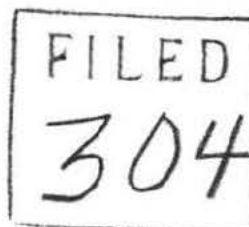
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COUNTY COURTS: County courts may execute leases for  
LEASES: several years providing current and  
COUNTY CONTRACTS: surplus funds on hand will be adequate  
CONSTITUTIONAL LAW: to pay their obligations under the  
BONDS: lease. Such lease could be funded by  
PUBLIC CONTRACTS: bonds if authorized by popular vote  
under Section 26(b) Article VI, Missouri  
Constitution 1945. County courts may  
execute a lease for multiple years that would be binding on  
succeeding courts, providing the contract is not for an unrea-  
sonable term or is in bad faith or fraudulent.

November 9, 1965

Opinion No. 304

Honorable Gerald Kiser  
Prosecuting Attorney of Clay County  
Court House  
Liberty, Missouri



Dear Mr. Kiser:

The opinions expressed herein are in response to the questions which you submitted as follows:

- "1. Does the county court have the authority to enter a lease for county office space wherein the county leases said space and contracts to pay rent for a period of more than one year?
- "2. If such a lease by the county court would be invalid can such a lease (for more than one year) be submitted to the voters and thereby the expenditure of rent for future years be authorized pursuant to Section 26(b) of Article VI."

In a subsequent telephone conversation between you and a member of this office, you stated that the court house had become very crowded due to the requirements of an additional circuit judge and other necessary expansions. The county court is attempting to plan some measure they could use as an alternative to meet the pressures of the required expansion. You stated one alternative (which is the hypothetical case here) would be for the county court to lease property and modify the space to suit the immediate needs of the county. One aspect being considered was to execute a long-term lease of 25 years or more.

Honorable Gerald Kiser

It is the validity of such a lease for such a term that this opinion is primarily concerned.

Section 26(a), Article VI, of the Missouri Constitution, reads as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution."

The pertinent statutes read as follows:

Section 49.510, V.A.M.S.

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Section 50.660, V.A.M.S.

"All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer. No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise

Honorable Gerald Kiser

unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating; \* \* \*

Section 432.070, V.A.M.S.

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

It is apparent under the statutory provisions set forth in Section 49.510, V.A.M.S. that the county does have an obligation to furnish office space to county officers. As a matter of fact, in the case of Buchanan v. Ralls County, 222 S.W. 1003, the Supreme Court held that where the county failed to provide the treasurer with an office, the county was bound to pay the reasonable cost of such an office, janitor service, etc. provided by the treasurer.

However, the short answer to your first question is in the negative. In the case of Ebert v. Jackson County, 70 S.W. 2d 918, 919, the court considered a four-year lease to the county to be used as a justice's court room in the county which was payable monthly in advance. The court stated as follows:

"Defendant admits such authority. However, it challenges the contract as in violation of section 12, art.10, of the Constitution, which follows: 'No county \* \* \* shall be allowed to become indebted in any manner or



Honorable Gerald Kiser

for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting \* \* \* at an election to be held for that purpose.  
\* \* \*

"It contends that said contract created a debt within the meaning of said section, and also contends that the contract is an effort to anticipate the income and revenue of the county for several years following the year the contract became effective. In considering said section of the Constitution in Book v. Earl, 87 Mo. 246, loc. cit. 252, we said: 'The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.'

"And in Trask v. Livingston County, 210 Mo. 582, loc. cit. 594, 600, 109 S.W. 656, 659, 37 L.R.A. (N.S.) 1045, we also said:

"It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created and prohibits the anticipation of the revenues of any future year. Any other construction would render section 12 of article 10 nugatory; for, if the county court of Livingston county in September, 1889, could

anticipate the revenue of 1890, it could also anticipate the revenues of 1891 and 1892, and would leave the power of the county, with reference to indebtedness, what it was before the Constitution of 1875 was adopted. \* \* \*

"Clearly the county court was not authorized to appropriate revenues, which were to be derived from taxation in the year 1890, when such taxes had never been assessed, levied, or collected. While the county court may in any one year draw warrants, after the revenue has been provided, and the taxes levied within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years. If not, all that has been said in regard to the force and effect of section 12 of article 10 of the Constitution, to the effect that its purpose was to put counties upon a cash system, instead of the old credit plan, has been in vain."

\* \* \* \* \*

"In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff \$4,320 for the use of the room for four years, beginning August 1, 1925, payable \$90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract became effective. It was an unconditional promise made by the county on July 18, 1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose.

"The contract was an effort to anticipate the income and revenue of the county for several years following the year the contract became

Honorable Gerald Kiser

effective. It created a debt within the meaning of said section of the Constitution, and is void."

The apparent reasoning is set forth in Missouri Toncan Culvert Co. v. Butler County, 181 S.W. 2d 506, 507, as follows:

"\* \* \* Constitutional safeguards for the protection of the people's money are not to be circumvented in such manner. They were enacted for a wholesome purpose and should be strictly enforced. All are bound to take notice of such safeguards. While this constitutional provision impliedly authorizes the fiscal agents to anticipate the revenue of the current year in the administration of the county's affairs, it explicitly forbids the anticipation of revenues for any future year, a forbidden act which the named fiscal agents admittedly sought to override. Trask v. Livingston County, 210 Mo. 582, 594, 600, 109 S.W. 656, 659, 660, 37 L.R.A. 1045; Ebert v. Jackson County, Mo. Sup., 70 S.W. 2d 918, 919 [2]; Hawkins v. Cox, 334 Mo. 640, 648 [3], 66 S.W. 2d 539, 543 [3-5]. These and other cases recognize and enforce the constitutional intent to abolish the credit system and to put counties and other political subdivisions on a cash basis by limiting the legal expenditures of any given year to the income and revenue of that year in the absence of some special authorization."

This position was affirmed in State ex rel. v. Cribb, 273 S.W. 2d 246.

Your second question whether a lease for multiple years can be submitted to the voters and the expenditure for rent authorized pursuant to Section 26(b), Article VI of the Missouri Constitution, has been carefully considered. This office sees no objection to such a procedure assuming that the issue of bonds to secure the additional money to pay for the lease is properly submitted to the people to be voted upon as provided in Section 26(b), Missouri Constitution 1945, subject to the limitations discussed hereafter. A caveat is noted at this time that if such an issue were submitted to the people, and the people did vote affirmatively upon the funding for the lease, the funds so secured could not thereafter be converted for any other purpose other than that for which the people voted. It has been so held by this office in an Opinion No. 10, of the Attorney General, Bowsher, April 29, 1953, which is attached.

Honorable Gerald Kiser

Implicit in the above comments is a legal question whether the county court can execute a contract or lease covering multiple years, assuming the availability of current and/or surplus funds on hand. This office has so held in the Opinion No. 62, of the Attorney General, Milfelt, December 28, 1961, a copy of which is attached.

This view is predicated upon the fact that the county court has been held to be a continuing body which is responsible for the administration of the county business. This issue was rather extensively discussed by the Supreme Court in *Aslin v. Stoddard County*, 106 S.W. 2d 472, 474, et seq. The extracts of the opinion are set out below:

"I. By statute, sections 2072 and 2073, RSMo 1929, Mo.St.Ann. §§ 2072, 2073, pp. 2656, 2657, the county court is composed of three members, styled judges, one of whom, by statute, the presiding judge, is elected by the county at large for a term of four years, the other two being elected, by districts, for a term of two years, the terms of all continuing until their successors are elected and qualified. In the instant case the terms of the two 'district' judges expired December 31, 1932, if their successors, elected at the November, 1932, election qualified promptly. The presiding judge held over. The county court is a court of record, having certain judicial functions. It also has many administrative duties in connection with the care and management of county property and funds, school funds, highways, etc., and the business affairs of the county generally. When new or different district judges are elected and qualify, no 'reorganization' of the court is required. The presiding judge continues to be such. If he is replaced by another, his successor becomes, by operation of law, presiding judge. In view of the constitutional and statutory provisions creating county courts and prescribing their functions and duties, it is clear that the county court is a continuing body--not a succession of different boards or 'courts.'"

\* \* \* \* \*

Honorable Gerald Kiser

"No case from this state is cited nor have we found any directly adjudicating the precise question now under consideration, viz., whether the county court may lawfully make a contract, binding upon the county (assuming good faith in the making thereof and reasonableness as to time of performance), the performance of which will extend beyond the terms of office of part or all of the members of the court as then constituted. \* \* \*"

\* \* \* \* \*

"\* \* \* The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs. To illustrate:

"In Walker v. Linn County, 72 Mo. 650, the county court, through an appointed agent, insured county property for a period of five years. Point was made, on demurrer, that the court had no power to make the contract. This court held that the county court, under its statutory authority to 'have the control and management' of the county's property and its statutory duty to 'take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage,'



Honorable Gerald Kiser

had the implied authority to insure the buildings belonging to the county. The contract was held valid. The question of the time of performance as extending beyond the terms of office of the then members of the court was not raised and was not discussed in the opinion, and that case therefore can hardly be considered authority one way or the other on the point we now have under consideration. But, if thought of at all, the time factor must have been regarded by the court as not affecting the validity of the contract. And, whether considered or not in that case, can it be doubted that the county court, empowered to insure the county property, could lawfully make a contract for insurance extending beyond the terms of office of its then members, if such contract was made in good faith and was (perhaps because of a lower annual premium than for a short period) advantageous to the county? We think not. Other illustrations might be given. In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold."

A limitation is imposed on the execution of a contract by the county court covering several years in that the contract should not be unreasonable as to the term nor constitute a fraud or be in bad faith as a matter of law under the facts.

It appears to this office that the county court might well execute a contract covering a period of two to five years (assuming validity in other areas) without too much question. It could possibly execute a valid contract for ten years depending on the particular facts. However, it would appear that a lease in excess of twenty-five (25) years executed by the county court is considered an unreasonable exercise of power under the facts. These comments, of course, would vary from case to case and would depend upon the judgment of the court as applied to the facts immediately involved in each particular case.

Honorable Gerald Kiser

The questions you submit are particularly difficult to answer with any definiteness or certainty inasmuch as they are based upon a hypothetical situation. We do not have the proposed lease at hand nor is there any certainty as to the facts. Consequently, the opinions expressed by this office in relation to this matter must be unconditionally qualified, and are based upon the questions submitted and the hypothetical facts.

CONCLUSION

It is the opinion of this office that:

(1) A county court may execute a lease covering several years, payable monthly in advance, where such obligation together with other expenses of the county does not exceed the constitutional prohibition under 26(a), Article VI, Missouri Constitution against an indebtedness larger than the estimated year's income, and available surplus funds on hand.

(2) Under Section 26(b), Article VI, Missouri Constitution, the people of the county could vote a sum of money by issuance of bonds in excess of the amount authorized for expenditures under Section 26(a), Article VI of the Missouri Constitution to fund the execution of a lease. This money so authorized must be expended for that limited purpose.

(3) The county court may execute a valid contract for a short term which would be binding on succeeding courts providing such contract is not unreasonable as to the term of the contract, in bad faith or fraudulent. It is the opinion of this office that a lease to secure space for county offices covering twenty-five (25) years is unreasonable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

MORTGAGES:  
CHATTEL MORTGAGES:  
RECORDERS:  
COUNTY RECORDERS:  
UNIFORM COMMERCIAL CODE:  
FEES, COMPENSATION AND SALARIES:  
FEES:

A recorder of deeds should accept for filing or recording a chattel mortgage on motor vehicles executed prior to July 1, 1965, when presented for filing or recording after such date if the fees payable for filing or recording such chattel mortgage prior to July 1, 1965, are tendered for such filing or recording.

Opinion Nos. 301 and 305

August 16, 1965

Honorable Allen S. Parish  
Prosecuting Attorney of Saline County  
Court House  
Marshall, Missouri

Dear Mr. Parish:

This is in answer to your letter of recent date in which you ask for an official opinion from this office concerning the duties of county recorders insofar as chattel mortgages are concerned. Your question is:

Should the recorder of deeds accept for filing or recording chattel mortgages on motor vehicles executed before July 1, 1965, and presented for filing or recording after such date and if so, what fees should be charged for such filing or recording.

Sections 443.480 to 443.520, R.S.Mo., relating to chattel mortgages were repealed by Senate Bill No. 241 of the 73rd General Assembly as of July 1, 1965.

The provisions so repealed provided that chattel mortgages were required to be filed or recorded in the office of the recorder of deeds to be valid against third parties. Fees were provided for such filing or recording.

Senate Bill No. 149 of the 73rd General Assembly, effective July 1, 1965, provides for perfecting liens on motor vehicles by recording on the title by the Director of Revenue.

FILED  
301

FILED  
305

*file*

Section 10--102 (2) Senate Bill No. 241 of the 73rd General Assembly provides as follows:

"(2) Transactions validly entered into before the effective date specified in Section 10-101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred."

Under such Section it may be held by the Courts of this State that the provisions of law which authorized filing and recording of chattel mortgages and the charging of fees for such filing and recording prior to July 1, 1965, are still applicable to chattel mortgages on motor vehicles executed prior to July 1, 1965, and presented for filing or recording on or after July 1, 1965.

The recorder of deeds is not required to determine the legal effect of Section 10-102 (2) of Senate Bill No. 241.

It is, therefore, our view that the recorder of deeds should accept for filing or recording chattel mortgages on motor vehicles executed before July 1, 1965, and presented for filing or recording after such date upon tender of the fees provided for such filing or recording prior to July 1, 1965.

The act of the recorder of deeds in accepting chattel mortgages on motor vehicles for filing or recording which were executed before July 1, 1965, and presented for filing or recording after such date does not in any way determine the validity of such filings or recordings or whether such filing or recording constitutes notice to third parties of a chattel mortgage or any other legal effect or result of such filing or recording.

#### CONCLUSION

It is the opinion of this office that a recorder of deeds should accept for filing or recording a chattel mortgage on motor vehicles executed prior to July 1, 1965, when presented for filing or recording after such date if the fees payable for filing or recording such chattel mortgage prior to July 1, 1965, are tendered for such filing or recording.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in cursive script that reads "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name.

NORMAN H. ANDERSON  
Attorney General



INSURANCE: Acceptance of regular life insurance law by New Empire Life Insurance Company, a stipulated premium plan company.

OPINION NO. 307



August 16, 1965

Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

By letter dated July 21, 1965, you requested an opinion from this office pursuant to Section 377.450 RSMo 1959, as to whether documents submitted by New Empire Life Insurance Company are in proper legal form for the acceptance of the provisions of Sections 376.010 to 376.670 RSMo 1959, by a life insurance company doing business under the stipulated premium plan pursuant to Sections 377.200 to 377.460 RSMo 1959. These documents consist of the Notice of a Special Meeting of the Board of Directors, Minutes of Special Meeting of Board of Directors and the Certificate of Amendment.

Section 377.450 provides that the Articles of Incorporation and Bylaws shall be amended to conform to the provisions of Sections 376.010 to 376.670, the same as if the company had originally been incorporated thereunder. Upon examination of the documents referred to in the previous paragraph, it is the opinion of this office that the documents conform to the provisions of Section 376.010 to 376.670 RSMo 1959, and the legal form thereof is approved.

The foregoing opinion which I hereby approve was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

August 24, 1965



Mr. William E. Towell, Director  
Missouri Department of Conservation  
Jefferson City, Missouri

Dear Mr. Towell:

It is my opinion that pursuant to House Bill 304, 73rd General Assembly, the State Inter-Agency for Outdoor Recreation shall on and after 13 October 1965 have and are the authority to:

1. Act as the official state agency for the liaison with the Federal Bureau of Outdoor Recreation;
2. Be the official state agency to receive and disburse federal funds available to this state for overall outdoor recreational planning;
3. Be the official state agency to receive and disburse to the above agency or political subdivision federal funds available for outdoor recreational programs;
4. Provide a forum for consideration of outdoor recreation problems affecting member agencies and be an advisory and planning agency for overall outdoor recreational programs; and
5. That The Agency has authority under the law to contract and/or execute written agreements to accomplish the above specific purposes subject to the fiscal limitations imposed by Sec. 8 of the above referenced Act.

Mr. William E. Towell

-2-

August 24, 1965

This opinion is prepared at the instance of the addressee to be used to cite as the authority of the state agency to deal with the Bureau of Outdoor Recreation for purposes of the Land and Water Conservation Fund Act.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

RCA:am

August 11, 1965



Mrs. Olean Barton  
Acting Secretary  
State Board of Registration for  
Architects and Professional Engineers  
P. O. Box 184  
Jefferson City, Missouri

Dear Mrs. Barton:

This is in answer to your request made on behalf of the State Board of Registration for Architects and Professional Engineers for an opinion of this office as to whether the first clause in sub-section (1) of Section 327.030-1, RSMo 1959, provides that the architectural experience required by this clause must all be acquired after attaining the age of 21 years.

The statute in question, so far as here pertinent reads as follows

"1. Any citizen of the United States of America, Alaska, Hawaii or Puerto Rico, over the age of twenty-one years and of good moral character, shall be registered by the board, on recommendation of its architectural division and payment of the fee required by law, if he shall claim in his application to be, and show to the satisfaction of the architectural division that he is, qualified for such registration under any of the following sub-divisions of this subsection:

"(1) That he has had eight years of architectural experience and architectural education combined, which period of eight years shall include not less than three years of architectural experience, acquired after attaining the age of twenty-one years, nor more than five years of architectural education;.."

Mrs. Olean Barton

It is our understanding the Board has interpreted the quoted portion of Subsection (1) to mean that an applicant may have eight years of architectural experience only or eight years of experience and architectural education combined, with not more than five years of architectural education being counted. We believe this interpretation of the statute is incorrect. The language is "That he has had eight years of architectural experience and architectural education combined \* \* \*". This language clearly means that experience alone will not satisfy the statute. There must be both experience and education to comply with this statute.

This clause provides that at least three years of architectural experience is necessary which must be acquired after the applicant has reached the age of twenty-one. If more than three years of architectural experience is counted toward the required eight years, there is no requirement that such additional experience be acquired after the age of twenty-one and, in our opinion, the Board would be acting in excess of its authority if it attempted to impose such a requirement.

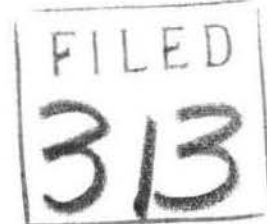
Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JGS/ms



October 14, 1965



Honorable Thomas A. David, Director  
Department of Revenue  
State of Missouri  
Jefferson City, Missouri

Re: Opinion No. 313

Dear Mr. David:

This letter is in answer to your request for an opinion of this office as to the taxability of the proceeds of certain insurance policies of Roy Arthur Guettler, Sr., deceased. Mr. Guettler had provided that the beneficiary of these policies was the City National Bank & Trust Company of Kansas City, Mo. as testamentary trustee of a trust set up in Mr. Guettler's will.

We have researched the question raised and, based on the information we have secured, in our opinion, the proceeds of the insurance policies in question are subject to Missouri inheritance tax.

Very truly yours,

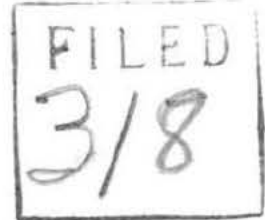
NORMAN H. ANDERSON  
Attorney General

By  
John H. Denman  
Assistant Attorney General

JHD:bf

Opinion No. 318  
(Answered by letter--  
Mansur)

September 9, 1965



Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Re: Opinion No. 318

Dear Mr. Burrell:

On August 3, 1965, you requested an opinion from this office concerning House Bill No. 573 of the 73rd General Assembly, providing for the establishment of a county mental health clinic; and whether the county could borrow money by issuing tax anticipation notes.

I am enclosing herewith an opinion issued by this office on March 16, 1961, to the Honorable Clifford Crouch, Prosecuting Attorney of Taney County, Forsyth, Missouri. This opinion deals with the authority of the Taney County Health Center to borrow money and of the County Court of Taney County to issue tax anticipation notes.

We believe that you will find the answers to the questions you have submitted concerning the county mental health clinic in this opinion. If, however, you have any further questions, we will be glad to consider them upon request.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

jlf  
Enclosure

STATUTE OF LIMITATIONS:  
WORKMEN'S COMPENSATION ACT:

Time for filing claim extended to one year after the filing of report of injury by employer, under Sections 287.430 and 287.440, Laws of 1965.

November 24, 1965

OPINION NO. 321

Honorable Richard J. Rabbitt  
8th District Representative  
7 North 7th - Suite 616  
St. Louis, Missouri 63101

FILED  
321

Dear Mr. Rabbitt:

Your letter of August 1, 1965, concerning Senate Bill No. 215 of the 73rd General Assembly requested whether the date of running of the statute of limitation set out in such bill is applicable when the injury occurred prior to the effective date of the bill and whether it applies where the report of the injury was filed prior to the effective date of the bill.

Senate Bill No. 215, 73rd General Assembly, Sections 287.430 and 287.440, Laws of 1965, repeals and reenacts Sections 287.430 and 287.440 RSMo, 1959.

Section 287.430 RSMo, 1959, provided that no proceeding under the Workmen's Compensation Act may be maintained unless the claim is filed within one year after the injury or death, or within one year from the date of the last payment if payment had been made on account of the injury or death. The new Section 287.430 is identical to the previous section, except that the time for filing a claim is extended to one year after the filing by the employer of a report of injury or death as required by Section 287.380, if the employee has filed the notice required by Section 287.420 RSMo. Section 287.380 requires the employer to file within a period of time after knowledge of an accident resulting in personal injury to an employee, a report of injury or death for which the employer would be liable for medical aid or compensation.

Section 287.430, Laws of 1965, is as follows:

Honorable Richard J. Rabbitt

"No proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within one year after the injury or death, or in case payments have been made on account of the injury or death, within one year from the date of the last payment, or in cases where the employee has filed the notice required by Section 287.420. the claim may be filed within one year after the filing by the employer of the report of injury or death as required by section 287.380. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the one year period provided in this section. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a guardian shall be deemed the termination of legal disability from minority or insanity."

The underscored portion of the statute indicates the amendment in the 1965 law.

To answer your questions specifically, if the injury occurred before the effective date of the legislation, the time for filing a claim is extended by the amendment, (unless the limitation period provided in Section 287.430 RSMo, 1959, has barred the claim). If the report of injury is filed before the effective date of the legislation but more than a year had elapsed since the injury or last payment of compensation, then the time for filing a claim would not be extended by the amendment.

Section 29, Article 3, of the Constitution of Missouri, of 1945, provides that legislation shall become effective ninety days after the adjournment of the Legislature which in this case is October 13, 1965.

The identical question has been considered by the Supreme Court of Missouri, in the case of *Wentz v. Price Candy Co.*, 352 Mo. 1, 175 S.W. 2d 852. Here Section 3727 RSMo 1939 was amended

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extending the time for filing claims under the Compensation Act, from six months to one year from the date of injury. Claimant was injured on April 26, 1941. At that time the statute required claims to be filed with the Compensation Commission within six months of the date of injury. Therefore the claimant had until October 26, 1941, to file her claim. The amendment to the statute extending the time for filing claims from six months to one year became effective October 10, 1941. The claimant filed her claim on December 26, 1941. This was within a year but more than six months after the date of injury. The Court said l.c. 853:

"The question for decision is whether the statute as amended is applicable to claims existing at the time the amendment became effective or only to claims accruing after such time. If the former, appellant's claim was timely filed. If the latter, appellant's claim remained subject to the six months' limitation, which period had expired and her claim was filed too late  
\* \* \*.

"A statute which affects only the remedy may properly apply to a cause of action which has already accrued and is existing at the time the statute is enacted. Ordinary statutes of limitation are held to affect the remedy only. The principle is well settled that the period of limitation prescribed by such statutes may be enlarged and become applicable to existing causes of action, but an enlargement of the period of limitation may not revive a cause of action which has been barred under the limitation as it previously existed. Annotation, 46 A.L.R. 1101. It is the rule in this State that a statute dealing only with procedure or the remedy applies, unless the contrary intention is expressed, to all actions falling within its terms whether commenced before or after the enactment."

Then at l.c. 855:

"The legislature clearly intended Section



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3727 to be one of limitation and repose, affecting the remedy only, and we are obliged to so regard it."

And at l.c. 857:

"The Workmen's Compensation Act is contractual. State ex rel. Brewen-Clark Syrup Co. v. Missouri Workmen's Comp. Comm., 320 Mo. 893, 8 S.W. 2d 897, 899. Still the application of the amendment enlarging the period of limitation to claims which had already accrued violates no constitutional inhibitions because the statute is procedural - applying to the remedy only. \* \* \*

"The amendment to Section 3727 extending the limitation period to one year governs appellant's claim. As her claim was filed within the year it was not barred but was timely filed."

Thus it will be seen that a statute extending the time for filing claims has been held to be a procedural statute and governs the remedy only.

In State v. Jensen, Mo., 363 S.W. 2d 666, a similar question on statutory construction was discussed. On p. 669 the Court said:

"\* \* \* Article I, Section 13 Constitution of Missouri 1945, V.A.M.S., which in substance bars the legislature of this state from passing a retroactive law, as follows: 'That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.'

"The mentioned constitutional provision does not apply in some cases, as for example, to a statute dealing only with procedure or the remedy. In such case the statute applies to all actions falling within its terms, whether

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commenced before or after the enactment, that is, unless a contrary intention is expressed by the legislature, and a statute affecting only the remedy may apply to a cause of action existing at the time the statute was enacted. See *Wentz v. Price Candy Co.*, 352 Mo. 1, 175 S.W. 2d 852. *Darrah v. Foster*, Mo. Sup., 355 S.W. 2d 24, 29(3); *Aetna Insurance Co. v. O. Malley*, 342 Mo. 800, 118 S.W. 2d 3, 8. \* \* \*

It is to be noted that the *Wentz* case, *supra*, which we have cited herein is approved and cited as authority.

We also call your attention to the case of *Welborn v. Southern Equipment Co.*, (not yet reported). This case was decided by the Supreme Court en banc on November 8, 1965. The former limitation statute, Section 287.430 RSMo, 1959, provided that a claim must be filed within one year after the date of injury or death, or within one year from the date of the last payment.

The court held that if medical treatment is furnished by the employer, even after the lapse of the specified period of one year, the claim is revived and the limitation time extended to one year after the date of the last medical treatment. The *Welborn* case also cites and approves the holding in the *Wentz* case.

#### CONCLUSION


It is the opinion of this office that by reason of the authorities cited herein that Senate Bill No. 215, Sections 287.430 and 287.440 Laws of 1965, which amend Section 287.430 and Section 287.440 RSMo, 1949, are procedural statutes and govern only the remedy and became effective October 13, 1965, and that the period of limitation in which a claim for Workmen's Compensation may be filed has been extended by this statute and shall apply to existing causes of action, but the

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enlargement of the period of limitation will not revive a cause of action which has been barred under the limitation previously existing.

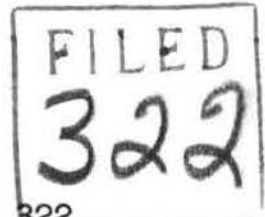
The foregoing opinion which I hereby approve was prepared by my assistant, O. Hampton Stevens.

Respectfully submitted,

  
NORMAN H. ANDERSON  
Attorney General

JUDGES: House Bill 390, 73rd General Assembly  
CIRCUIT JUDGES: (Section 478.013 RSMo.) applies to  
COURTS: the Circuit Judge of Cole County and  
OFFICERS: provides that his salary shall be  
COMPENSATION OF OFFICERS: Sixteen-Thousand dollars per annum  
COUNTY COURTS: payable out of the state treasury and  
if the county court should so order,  
an additional Three-Thousand dollars  
per annum to be paid by Cole County.

September 17, 1965



OPINION NO. 322

Honorable James T. Riley ✓  
Cole County Prosecuting Attorney  
Jefferson City, Missouri

Dear Mr. Riley:

This is in response to your request for an opinion of this office as to whether House Bill No. 390, 73rd General Assembly, relating to salaries of circuit judges, makes any provision for the salary of the judge of the circuit court of Cole County.

House Bill No. 390, 73rd General Assembly will be known as Section 478.013 RSMo. Subsection 1 thereof relates to judges of the circuit courts of circuits composed of a single county or city which now has or may hereafter have more than Two-Hundred-Thousand inhabitants and Subsection 2 relates to judges of judicial circuits composed of a single county within which is located part of a city, which city now has or may hereafter have more than Seventy-Five-Thousand and less than Two-Hundred-Thousand inhabitants.

Subsection 3 applies to all the other circuit judges of Missouri, including Cole County, and states:

"All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state

Honorable James T. Riley

treasury. If the county courts of all of the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit. The county part of the salary shall be divided among the counties and be paid by them proportionately as the population of each county bears to the entire population of the circuit."

Subsection 1 of Section 1.030 RSMo, states:

"Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person is included, although distributive words are not used."

Applying the last quoted section to subsection 3 of Section 478.013 RSMo, the language "if the county courts of all the counties composing a circuit so order, the judge of that circuit shall receive an additional Three-Thousand dollars per annum to be paid by the counties composing the circuit," should be interpreted to read when applied to Cole County, "if the county court of the county composing a circuit so orders, the judge of that circuit shall receive an additional Three-Thousand dollars per annum to be paid by the county composing the circuit."

Therefore, this office concludes that Section 478.013 applies to the circuit judge of Cole County and provides that his salary shall be Sixteen-Thousand dollars per annum payable out of the state treasury and if the county court should so order, an additional Three-Thousand dollars per annum to be paid by Cole County.

You do not ask, we have not considered and do not pass upon the constitutionality of House Bill 390, (Section 478.013 as amended).



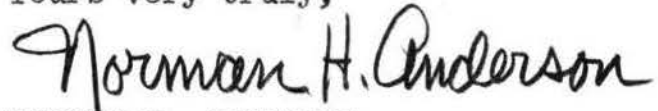
Honorable James T. Riley

CONCLUSION

It is the opinion of the Attorney General that House Bill 390, 73rd General Assembly (Section 578.013 RSMo), applies to the circuit judge of Cole County and provides that his salary shall be Sixteen-Thousand dollars per annum payable out of the state treasury and if the county court should so order, an additional Three-Thousand dollars per annum to be paid by Cole County.

The foregoing opinion which I hereby approve was prepared by my assistant, Donald L. Randolph.

Yours very truly,

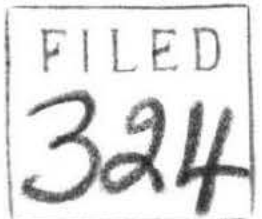
A handwritten signature in cursive script that reads "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name and title.

NORMAN H. ANDERSON  
Attorney General

ELECTION COMMISSIONERS: The Board of Election Commissioners  
BOARDS: has the responsibility to determine  
ELECTORS: the qualification of voters. Where  
NAMES: an elector changes his name, he is  
ELECTIONS: entitled to reregister under such  
name if the change of name was bona fide and not fraudulent  
in its purpose. Where an issue of good faith arises in a  
change of name, the Board, after hearing all the evidence,  
should determine if such change of name is bona fide. If the  
parties act in good faith with full disclosure of the facts,  
there would be no violation of Section 129.680, RSMo 1959.

December 30, 1965

OPINION NO. 324



Mr. Fred A. Murdock  
Board of Election Commissioners  
for Kansas City, Jackson County, Missouri  
1331 Locust Street  
Kansas City, Missouri

Dear Mr. Murdock:

This opinion is submitted in response to your inquiry by  
letter wherein you posed four questions which are as follows:

1. May the Kansas City Election Board refuse to register  
an applicant if the applicant does not furnish proof  
of identity satisfactory to the Board?
2. May the Board refuse to register an applicant in a  
name given by the applicant if the applicant fails  
to produce evidence satisfactory to the Board that  
the name given is the applicant's true name?
3. Under the facts hypothesized above, may the Board  
refuse to change the registration of Samuel Brown  
to show his name as Samuel Brown Ali and, in parti-  
cular, would such refusal constitute a violation of  
Section 129.680, RSMo 1959?
4. Under the facts hypothesized above, is Samuel Brown's  
attempt to register under the name of Samuel Brown  
Ali a violation of Section 129.680, RSMo 1959?

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You submitted certain hypothetical facts to be considered as follows:

"'Samuel Brown' is a qualified voter and is registered in that name. He now presents himself with the request that his registration be changed to shown his name as 'Samuel Brown Ali'. He claims that 'Ali' is his true surname; however, every document he can produce in proof of his identity gives his name as Samuel Brown. He admits that he was named Samuel Brown at birth and has been so known most of his life. He further admits that he never has undertaken to effect a formal change of name from Samuel Brown to Samuel Brown Ali by an appropriate legal proceeding or action. He contends that 'Ali' was the true name of his family in the country of their origin but fell into disuse following the settlement of his ancestors in the United States. He further states that he only recently became aware of these facts. The Board assumes that Samuel Brown Ali is not the name of another person."

It is also noted that our opinion is limited to the interpretation of the law under Chapter 117 VAMS as applied to the limited area of Kansas City, that is in Jackson County. Accordingly this opinion does not purport to interpret Chapters 114 or 119 VAMS as applied to those parts of Kansas City which are located in either Platte or Clay County.

The constitutional and statutory provisions in pertinent parts are as follows:

"All citizens of the United States, \* \* \* over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, (and no other person, shall be entitled to vote at all elections by the people) \* \* \*." Article VIII, Section 2, Constitution of Missouri, 1945.

Article VIII, Section 5, Constitution of Missouri, 1945, provides as follows:

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"Registration of voters may be provided for by law."

Section 117.040 VAMS reads as follows in pertinent parts:

"Every citizen of the United States \* \* \* shall be entitled to vote at such election for all officers, \* \* \* but shall not vote elsewhere than in the precinct where his name is registered, and whereof he is registered as a resident."

(Underscoring Supplied)

Section 117.050, subparagraph 6, reads in pertinent parts:

"Said board of election commissioners shall make all necessary rules and regulations, not inconsistent with this chapter, with reference to the registration of voters and the conduct of elections and shall have charge of and make provisions for all elections, general, special, local, municipal, state, county, all primaries, and of all other of every description, to be held in such city or any part thereof, at any time."

(Underscoring Supplied)

Section 117.300, provides in pertinent parts:

"The method of conducting registration shall be regulated by the board by the same rules, regulations, and instructions, subject, however, to the following provisions:

"(1) Only such persons as shall be duly qualified to vote within the city at the next succeeding election and who shall personally apply for registration shall be registered \* \* \*.

"(2) Every person who applies for registration, \* \* \* shall make out, sign and present to the registration officer an application for registration on an application blank substantially as follows: \* \* \*(Requires the name and other information be furnished).

"(7) After the affidavit of registration has

Mr. Fred A. Murdock

has been prepared, the voter shall be required to take oath to the affidavit of registration, \* \* \*. No person shall be registered as a voter unless he take the required oath and subscribe to the original and duplicate affidavits by signing his name in the proper space \* \* \*."

Section 117.310, subparagraph 2, reads in pertinent parts:

"Upon the receipt of an application for transfer or reinstatement the signature on the application shall be compared with the signature on the registration record: \* \* \*"

Section 117.560, reads in pertinent parts:

"Any qualified elector, on the day of election, in any precinct, shall be entitled to receive from the judges of election a ballot to be voted at said election, after such elector is identified as in this section provided. After such identification, it shall be the duty of such judges to deliver such ballot to the elector. Such elector shall identify himself to such judges and sign his name and address either in whole or by mark upon a voter's identification certificate furnished him by the clerk \* \* \*."

The general rules governing the construction of registration laws is stated in 29 C.J.S., Elections, Section 37, Page 106, as follows:

" \* \* \* The primary purpose of registration laws is to prevent the perpetration of fraud at elections by providing in advance thereof an authentic list of the qualified electors. Every part of a registration act must be so construed as to effectuate this purpose, and to give electors the fullest opportunity to vote that is consistent with reasonable precautions against fraud. \* \* \* Likewise, all provisions of such laws should, if possible, be construed so as to avoid conflict."



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In 29 C.J.S. Elections, Section 13, Page 57, it is stated that registration laws, as,

" \* \* \* such . . . usually are not regarded as adding a new qualification to those prescribed by the constitution, or as abridging the constitutional right of suffrage, but rather as reasonable and convenient regulations of the mode of exercising the right of suffrage.  
\* \* \*"

In State ex rel Meyer vs. Woodbury, Missouri Supreme Court, 10 S.W. 2d 524, the court held that a statute requiring a vote to be registered before being eligible to vote was not a conflict with the constitutional provision defining voters' qualifications, and that such statute did not impose an unreasonable requirement upon the voter.

In State ex rel Hay vs. Flinn, 147 S.W. 2d 210 the Court held that the principle of registration law is to prevent the fraudulent abuse of the franchise by providing in advance of election an authentic list of qualified voters.

The summation of general principles (which is set out above) should be borne in mind in considering the four questions which you posed.

In response to the first question, it is basic that every qualified person must be afforded the right to vote (State ex rel Ellis vs. Brown 33 S.W. 2d 104, 107). The sole objective of the statutes (Chapter 117 with which we are concerned) is to determine those who possess the qualifications of an elector as defined by statute and to make a public record thereof (State ex rel Ellis vs. Brown, supra). It should be clear, having in mind the statutes set forth above, that qualified voters are identified by name. To accomplish its delegated powers, the Board (under Section 117.050 VAMS supra) may prescribe rules and regulations for registration not inconsistent with the Constitution of Missouri and the referenced Chapter. Normally, registration is accomplished, by the execution of the "affidavit of registration" by the elector but it is not necessarily limited to this alone. The Board under Section 117.050 VAMS may impose additional requirements to supplement the statutory

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registration procedures. The duty of passing on the qualifications of the voters and the legality of their votes rest with the election officials. \* \* \* (Nichols vs. Reorganized School District No. 1 of Laclede County, 364 S.W. 2d 9, 13; State ex rel Meyer vs. Woodbury et al 10 S.W. 2d 524, 526). Where the election officials are given this responsibility of determining the qualifications of the voters, the Board should have the authority to accomplish those designated purposes. This office concludes, therefore, that if registrars are not satisfied that the applicant is a qualified elector, they may require further proof of the elector's qualifications. If satisfactory proof of qualifications of an elector is not presented, the Board may refuse to register or reregister the elector. (State ex rel Meyer vs. Woodbury, supra).

Thus, considering the situation submitted in your request for an opinion, the Board should consider the contentions of the elector as well as all other pertinent facts such as the electors drivers license, social security card, draft registration, etc., which still show his name, as registered, to be Samuel Brown. Upon consideration of all the facts, the Board should determine, in the exercise of its discretion, whether there had been a bona fide change of name under the principles which we discuss next.

Your second question must be answered in the affirmative. It should appear from the answer given to your first question, the Board does have the duty to determine the electors "true name" for registration purposes. The term "true name" (as used here) is hereafter defined.

The Supreme Court in St. vs. Crowe, 382 S.W. 2d 38, 42, had this to say about 'names':

"[1] The word 'name' as used in the statutes providing for the publishing and printing of a candidate's name should be taken in its plain ordinary and usual sense as provided in § 1.090 RSMo 1959, VAMS and as said in the case of State ex rel. Lane v. Corneli, 347 Mo. 932, 149 S.W. 2d 815, 1.c. 821.

"The common law recognized only one Christian name or given name and one family surname,

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State v. Hands, Mo., 260 S.W. 2d 14; Nolan v. Taylor, 131 Mo. 224, 32 S.W. 1144; Carlton v. Phelan, 100 Fla. 1164, 131 So. 117; Feldman v. Silva, 54 R.I. 202, 171 A. 922; 65 C.J.S. Names § 3, p. 2.

"It has been held that the middle name or initial of an individual is unimportant and forms no part of the Christian name. State v. Hands, supra; Miller v. Medley, 236 Mo. 694, 139 S.W. 158. However, in modern times recognition is frequently given to one or more middle given names or initials. In the case of State ex rel. Lane v. Corneli, supra, the Supreme Court in defining the meaning of the word 'name' said (149 S.W. 2d at l.c. 821):  
\* \* \* A person's name is the designation ordinarily used, and by which he or she is known in the community. Names are used as a method of identification. Whether the identification is sufficient is ordinarily a question of fact.' This definition was given by the court in connection with the use of the word 'name' as contained in the statutes relating to the assessment of personal property.

"[2] In State ex rel. Kansas City Public Service Company v. Cowan, 356 Mo. 674, 203 S.W. 2d 407, l.c. 408, the Supreme Court said: ' \* \* \* After all, a name is only what one calls himself for purposes of identification. \* \* \* ' A person's name, therefore, is the designation by which he is commonly known and one which he knows himself and others call him. State v. Deppe, Mo., 286 S.W. 2d 776, 781; Ohlmann v. Clarkson Sawmill Co., 222 Mo. 62, 120 S.W. 1155, 28 L.R.A., N.S., 432; Nolan v. Taylor, supra.

Under certain circumstances, one may lawfully change his name without resort to any legal proceedings and the name thus assumed will constitute his legal name just as much as if he had borne it from birth. This principle is aptly stated in 65 C.J.S. "Names" § 11 page 19 as follows:

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"In the absence of statutory restriction, one may lawfully change his name without resort to any legal proceedings as long as it does not interfere with the rights of others and where it is not done for a fraudulent purpose. The name thus assumed will constitute his legal name for all purposes just as much as though he had borne it from birth or as though it had been provided for by a court order, even though the name taken is the name of another living person. A person who has changed his name without resort to legal proceedings may subsequently assume the name given him at birth. The common-law right of a person to change his name is limited in some jurisdictions, however, by statutes which require a person transacting business under a fictitious name which does not show the name of the person interested to file and publish a prescribed statutory certificate."

This general statement of the law as announced in C.J.S. was approved by the Supreme Court, en banc, in State ex rel Kansas City Public Service Company vs. Cowan, 203 S.W. 2d 407.

Thus, if the Board should find that the "true name" of Samuel Brown has been in fact, changed to Samuel Brown Ali based on the evidence submitted, the Board should permit Samuel Brown to reregister and thereby become eligible to vote under the name of Samuel Brown Ali (if otherwise qualified). If on the other hand the evidence submitted to the Board is not persuasive of a bona fide change of name of the applicant, then the Board should deny the application on the grounds that the evidence does not support the proposal submitted. It is for the Board to pass on the sufficiency of the evidence.

We believe the procedure for change of names found in Section 527.270 RSMo to be permissive only and not a compulsory prerequisite to use of another name. Section 527.270 supra reads as follows:

"Hereafter every person desiring to change his or her name may present a petition to that effect, verified by affidavit, to the circuit court in the county of the petitioner's residence, which petition shall

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set forth the petitioner's full name, the new name desired, and a concise statement of the reason for such desired change; and it shall be the duty of the judge of such court to order such change to be made, and spread upon the records of the court, in proper form, if such judge is satisfied that the desired change would be proper and not detrimental to the interests of any other person."

Since identification of an elector is by name, an elector should be allowed to vote only in the name in which he is registered. Thus, if the elector is registered as Samuel Brown, he should be permitted to vote only as Samuel Brown (if otherwise qualified). When duly reregistered as Samuel Brown Ali, he should be permitted to vote only under the name of Samuel Brown Ali (if otherwise qualified).

The third question requires two separate considerations. It is assumed your interest indicated in the third question involves Section 129.680 VAMS and is confined to that portion of that statute which imposes sanctions for those election officials who by "other unlawful means, prevent, hinder or delay any person having a legal right to register or to be registered, from duly exercising such right; \* \* \* shall be judged guilty of a felony, etc."

The gravamen of the offense under Section 129.680 simply stated, is the unlawful interference with the right of an elector to exercise his franchise to vote. Our answer is limited to the facts contained in your inquiry. Assuming the Board acted reasonably; in good faith without any fraudulent purpose and upon a fair consideration of all the evidence, the conclusion that no violation occurred appears justified.

Your fourth question is answered in the negative under the facts. Samuel Brown's adoption of the name of Samuel Brown Ali apparently was not fraudulent and was not done with any illegal purpose according to your statement of facts but rather with a full disclosure of all facts and under a claim of right. Having in mind the discussion set forth above, this office concludes that Samuel Brown's attempt to register under the name of Samuel Brown Ali is not a violation of Section 129.680 VAMS (State vs. White 140 S.W. 896; State vs. Dunwoody 132 S.W. 227, 228).



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The conclusions herein are limited to the facts stated in your request for an opinion.


CONCLUSION

It is the opinion of this office that:

1. The Kansas City Election Board has the duty to determine the qualifications of electors. If after consideration of all pertinent facts, the Board, in its discretion, may refuse to register an elector for cause.
2. The Board, in its discretion, can conclude that an elector has failed to establish proof of a bona fide change of name.
3. An elector may validly change his name (if not done for fraudulent purposes) and when properly reregistered under such adopted name, the elector should be entitled to vote under his adopted name, if otherwise qualified.
4. Where an election board, in good faith and for reasonable cause, rejects an elector's application to register to vote, there is no violation of Section 129.680, RSMo 1959.
5. Where an elector, in good faith and with full disclosure of all the facts, attempts to register to vote, there is no violation of Section 129.680, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

INSURANCE: Articles of Incorporation of Empire Security Life  
Insurance Company

OPINION NO. 325

August 16, 1965



Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

By letter dated August 9, 1965, you requested an opinion from this office as to whether documents submitted by Empire Security Life Insurance Company are in accordance with Chapter 376 of the statutes and are not inconsistent with the Constitution and laws of this state and the United States. These documents consist of an executed copy of the Declaration of Intention of the original incorporators of Empire Security Life Insurance Company, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376 RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Sections 376.-050 and 376.070 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959. It is noted that the Notary Public before whom the Publisher's Affidavit of Publication was executed failed to indicate the expiration date of her commission. Such omission does not invalidate the affidavit; *New v. Corrough*, 370 S.W.2d 323. However, the omission should be supplied to prevent the question arising in the future as to whether or not the Notary Public's commission was in effect at the date of the execution of the Affidavit of Publication.

It is the opinion of this office that the documents referred to in the first paragraph hereof are in accordance with the provisions of Chapter 376 RSMo 1959 and are not inconsistent with the Constitution and laws of this state and the United States.

Honorable Robert D. Scharz

Page 2

The foregoing opinion which I hereby approve was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:aa

August 20, 1965



Honorable John T. Russell  
State Representative  
Laclede County  
Lebanon, Missouri

Dear Mr. Russell:

This is in response to your request dated August 10, 1965,  
for an opinion on the following questions:

- "No. 1 - Will Industrial Revenue Bonds in anyway,  
or in any event affect the taxation of  
the City's citizens or their property?
- "No. 2 - Is it correct to assume, in event of de-  
fault by the leasee the city will not be  
liable to assume the obligation?
- "No. 3 - Would other Revenue Bonds, such as Electric  
and Water Bonds affect the taxes within  
the city?"

Article VI, Section 27, of the Constitution of Missouri re-  
lating to revenue bonds provides:

"Any city or incorporated town or village in this  
state, by vote of four-sevenths of the qualified  
electors thereof voting thereon, may issue and sell  
its negotiable interest bearing revenue bonds for  
the purpose of paying all or part of the cost of  
purchasing, constructing, extending or improving  
any of the following: \* \* \* \*; (2) plants to be  
leased to private persons or corporations for manu-  
facturing and industrial development purposes, in-  
cluding the real estate, buildings, fixtures and  
machinery; or (3) \* \* \* \*, the cost of operation  
and maintenance and the principal and interest of  
the bonds to be payable solely from the revenues  
derived by the municipality from the operation of  
the utility or the lease of the plant. Amendment  
adopted at general election Nov. 8, 1960."

Honorable John T. Russell

Section 71.820, RSMo 1963 Cum. Supp., enacted by the Legislature in 1961, pursuant to the foregoing Section 27, Article VI, of the Constitution provides:

"Any municipality may issue revenue bonds to provide funds for the carrying out of a project under sections 71.790 to 71.850. The revenue bonds shall be paid solely from revenue received from the project, and shall not be a general obligation of the municipality."

Section 71.830, RSMo 1963 Cum. Supp., provides that the city shall prescribe the form of the bonds by ordinance. Section 71.833, RSMo 1963 Cum. Supp., provides:

"At or before the issuance of the revenue bonds the governing body shall, by ordinance, create a sinking fund for the payment of the bonds and the interest thereon, and shall set aside and pledge a sufficient amount of the revenues of the project to be paid into the sinking fund at intervals to be determined by ordinance prior to the issuance of the bonds, for

(1) The interest upon the bonds as such interest shall fall due;

(2) The necessary fiscal agent charges for paying bonds and interest; and

(3) The payment of the bonds as they fall due or if all of the bonds mature at the same time, the proper maintenance of a sinking fund sufficient for their payment at maturity."

Section 71.837, RSMo 1963 Cum. Supp., provides:

"Revenue bonds issued under sections 71.790 to 71.850 shall not be payable from or charged upon any funds, other than the revenue pledged to the payment thereof, nor shall the municipality issuing the bonds be subject to any pecuniary liability thereon. Each revenue bond issued under sections 71.790 to 71.850 shall recite, in substance, that the bond, including interest thereon, is payable solely from the revenue pledged to the payment thereof and that the bond does not constitute a debt of the municipality within the meaning of any constitutional or statutory limitation."



Honorable John T. Russell

The Supreme Court of Missouri en banc in City of Maryville vs. Cushman, 249 SW2d 347, 351, in discussing the liability of municipality for sewer and revenue bonds, said:

" \* \* \* The taxing power of the municipality is not pledged and it is specified that the bonds shall not be a general obligation of the city within the constitutional provision. We have many times ruled that bonds payable solely from the revenues of a municipal utility, service or facility, and not from taxation, are not a general municipal indebtedness within the Constitution. \* \* \* "

Also in Bader Realty and Insurance Company vs. St. Louis Housing Authority, 217 SW2d 489, 494, the Supreme Court of Missouri en banc held that the revenue bonds of the Housing Authority were not an indebtedness of the City of St. Louis. Likewise in State ex rel City of Fulton vs. Smith, 194 SW2d 302, 306, the Supreme Court of Missouri held that the city's taxing power was not pledged to the payment of water and electric plant revenue bonds.

Therefore, municipal revenue bonds do not authorize the city to tax property of the owners to pay said bonds. In the event of default of revenue bonds, neither the city nor the taxpayers thereof are liable for the payment of such revenue bonds. Revenue bonds are paid from revenue specifically provided for in the bonds and not from any other source of the city's revenue.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

JGS/jlf

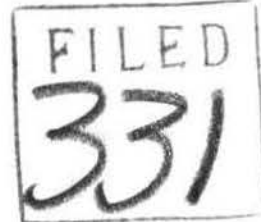
LEVEE DISTRICTS:  
COUNTY COURTS:  
BOARD OF EQUALIZATION:

- (1) County Board of Equalization cannot change benefit assessment for levee.
- (2) Benefit assessment for maintenance tax may be changed under Section 243.063.

December 30, 1965

Opinion No. 331

Honorable W. D. Hibler, Jr.  
State Representative  
Chariton County  
Brunswick, Missouri



Dear Representative Hibler:

In your letter of August 11, 1965, you requested an opinion of this office concerning the right of land owners in a county court levee district to have benefit assessments reduced because of changes in the water courses and other work done in the district which you state nullified the benefits previously assessed.

Statutes providing for the organization and maintenance of levee districts formed by the county court are found in Sections 245.285 to 245.545, RSMo 1959.

In your first question, you inquire whether the land owners concerned can apply to the County Board of Equalization under Section 245.465 for readjustment of the assessment benefits. In order to answer this question, it will be necessary to review a few of the statutes providing for the assessment.

Section 245.450 provides in part that after the formation of any levee district as provided herein, the county court shall cause the county assessor at the first annual assessment to be made under the general revenue laws to assess the value of all lands in said levee district subject to overflow or inundation or erosion and to be benefited by said levee work having reference to the value of the land without the work and the value thereof as improved by said work.

Section 245.455 sets out the procedure to be followed by the assessor making the assessment and entering it on the books.

Section 245.460 provides in part for the assessment book as prepared by the county assessor to be filed with the clerk of the county court at the same time the assessor's book for state and county taxes is filed with the county clerk. It also provides for the county assessor to furnish a copy of said assessment book to the board of directors of the levee district. It further provides for the board of directors of

Honorable W. D. Hibler, Jr.

the levee district to call a meeting of all land owners in said district to show cause, if any, why said land should not be assessed with their proportional part of the cost of the work.

Section 245.465 provides in part that the County Board of Equalization shall have the same jurisdiction over the lands taxed for levee purposes as is conferred by the general laws of the state in assessments of property for state and county purposes.

We believe that under the statutes governing the construction and maintenance of levee districts organized by a county court, that the assessment of benefits to the land in the district is to be made only once. The authority of the County Board of Equalization is limited to changing the benefit assessment as provided in Section 245.465, and once the benefit assessment has become final it cannot be changed by said Board. The County Board of Equalization has no jurisdiction over the rate determination provided for in Sections 245.470 and 245.445. If the original benefit assessment has been made and has become final, it is to be used as the basis for determining the payment or payments to be made for construction of levees or other works and the yearly tax levy necessary for maintenance of said levee district under Section 245.445, is based on such valuation. After the original benefit assessment has become final, any land owner may pay the total benefit assessment as provided in Section 245.475.

It does appear however, that a property owner in a levee district may be able to obtain a reduction or cancellation of benefits under certain conditions under Section 246.063, RSMo 1959. This section provides in part that when any lands within a levee district are so situated that subsequent improvements constructed in the district either by the district or by some other agency partially or wholly nullifies the benefits accruing from improvements previously constructed by the district for which benefits were assessed, a property owner in the district may petition the court where the district was organized and request the benefits against the land improvements previously constructed be reduced for the purpose of making a more equitable basis for the levy of the maintenance tax or that the benefits be cancelled. This section further provides that no assessed

Honorable W. D. Hibler, Jr.

benefits shall be reduced or cancelled while the district has outstanding bond obligations. Therefore, it would appear that the answer to your second question depends upon whether the district has any outstanding bond obligations.


CONCLUSION

It is the opinion of this Department:

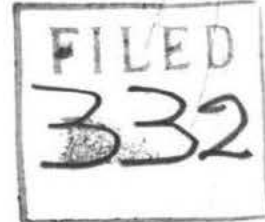
1. That the County Board of Equalization has no authority to change a benefit assessment after it has become final in a levee district organized by a county court.
2. That a land owner in such district may have the benefit assessment for the maintenance tax reduced or cancelled under the conditions specified under Section 246.063, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Moody Mansur.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

August 31, 1965



Honorable Harold L. Fridkin  
Jackson County Counselor  
Suite 202, Courthouse  
Kansas City, Missouri 64106

Dear Mr. Fridkin:

This is in reply to your August 13th request for an opinion wherein you inquire as to whether "The Transportation Planning Commission of Greater Kansas City, Missouri", can contract with the Federal Government without State governmental approval.

Section 70.220, RSMo 1959, which was enacted pursuant to Article VI, Section 16, Constitution of Missouri 1945, reads in part as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. \* \* \*"

The above language expressly authorizes municipalities and political subdivisions of the State to contract with agencies of the Federal Government.



Honorable Harold L. Fridkin

Section 70.260, RSMo 1959, provides that a contract entered into as provided by Section 70.220, RSMo 1959, may establish a joint board or commission. The contract you have enclosed does create such a joint commission of nine members and provides that such commission may enter into contracts with the United States Government.

These sections were enacted as part of HCSHB 90 of the 64th General Assembly in 1947 which Act repealed HCSHB 490 of the 63rd General Assembly which provided for cooperative agreements. Such HCSHB 90 enacted what are now Sections 70.210 to Section 70.730 RSMo.

The next question then is whether there is any statute which modifies or limits the application of the aforementioned statutes. Chapter 255 which established the Division of Resources and Development was enacted in 1943. Section 255.130 and Section 255.140 were enacted in 1959. Section 255.130, RSMo 1959, provides in part:

"The state division of resources and development is hereby authorized, upon the request of the governing body of any county, municipality or metropolitan area in this state to:

- (1) Provide planning assistance \* \* \*
- (2) Contract, for, receive, and utilize any grants or other financial assistance \* \* \*."

Section 255.140, RSMo 1959, provides in part:

"The state division of resources and development is hereby designated as the official state planning agency for the purpose of providing planning assistance to counties, municipalities and metropolitan planning areas, and for such purposes is hereby authorized and empowered to:

- (1) Contract with public agencies \* \* \*
- (2) Delegate any of its functions to any other state agency \* \* \*;

Honorable Harold L. Fridkin

(3) Require or receive reimbursement from any political subdivision or subdivisions receiving assistance under Section 255.130 to 255.150; \* \* \*

This situation then presents the problem as to whether Sections 255.130 and 255.140, RSMo 1959, by their subsequent enactment to Section 70.220 were intended to limit or modify the broad authority granted by Section 70.220, or expressed differently, Do the provisions of Section 255.130, 255.140 and 255.150 make the mandatory requirement that the State Division of Commerce and Industrial Development act as agent for the Planning Commission in executing the proposed contract or may the Transportation Planning Commission of greater Kansas City, Missouri, act for itself directly with the agency of the Federal Government?

When Sections 255.130 and 255.140, RSMo 1959, were enacted there was no complementary amendment of Section 70.220 to indicate that the Division referred to in Section 255.130 and 255.140, RSMo 1959, was to be the exclusive agency with which municipalities and political subdivisions should deal in their contract arrangements with the Federal Government. There is one phrase in Section 255.130, RSMo 1959, which infers that its operation is permissive rather than mandatory. That is the phrase "\* \* \* upon the request of the governing body of any county, municipality or metropolitan areas \* \* \*."

The general rule of construction is that one statute will not be deemed to have modified or repealed another statute wherein there is a possible conflict between the two, if the two statutes may be construed together. Since we are unable to find any language which shows a clear intention on the part of the Legislature to limit or restrict the broad application of Section 70.220, RSMo 1959, we conclude that Section 255.130 and 255.140, RSMo 1959, are permissive and not mandatory. In other words the municipality or subdivisions may either utilize the services of the Division under the provisions of Section 255.130, 255.140 and 255.150, RSMo 1959, or at its election may operate under the broad authority of Section 70.220, RSMo 1959, in its dealing with agencies of the Federal Government.

You have not asked us and we do not pass in any way upon the validity of the agreement creating the "Transportation Commission

Honorable Harold L. Fridkin

of Greater Kansas City, Missouri" or on the validity of the provisions therein. We hold only that a properly executed agreement under Sections 70.220 and 70.260, RSMo 1959, providing for a commission created by such agreement with power to contract with the Federal Government can contract with the Federal Government without approval of any state agency.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

JGS/ms

November 23, 1965



Honorable Alden S. Lance  
Prosecuting Attorney  
Andrew County  
415 West Main Street  
Savannah, Missouri

Dear Mr. Lance:

You request an opinion concerning Section 43.170, RSMo 1959, which makes it a misdemeanor for the operator of a motor vehicle to refuse to stop or "obey any other reasonable signal or direction" of a member of the highway patrol "given in directing the movement of traffic on the highways."

The factual situation outlined is as follows:

"The individual under the wheel of this automobile started to drive onto the State Highway and the Patrolman stopped the car and directed the individual not to drive the vehicle on the public highway in his condition because if he did so he would be arrested for driving while intoxicated. The individual then backed the vehicle off of the State Highway right-of-way onto private property and parked it in apparent compliance with the Officer's direction. About 15 minutes later the Officer and another Highway Patrolman observed this vehicle being driven by the same individual down the public highway and he was arrested for driving while intoxicated and brought to the county jail, and he was given a summons to appear in Court for intoxicated driving, and failure to obey a reasonable direction of a member of the State Highway Patrol."

You want to know if the charge under Section 43.170 will stand.

Honorable Alden S. Lance

Section 43.170, RSMo 1959, provides in part as follows:

"It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highways. \* \* \*"

The apparent and logical purpose of the law in question is to give the highway patrol reasonable latitude in unusual or emergency situations, not otherwise covered by law, to insure the safe and expedient flow of traffic over the highways and to provide for the punishment of those who refuse to cooperate to the detriment of the public at large.

The law should not be interpreted as establishing a means whereby the punishment for offenses already provided for may be enhanced or compounded.

The language of the statute conveys the definite impression that it is intended to vest in the patrolman control and management of traffic as immediate circumstances require. This leads to the clear inference that the act condemned is the failure or refusal of a driver to obey the "reasonable signal or direction" in the presence of the patrolman for some condition existing at that time.

Therefore, the situation which you outline does not come within the purview of this law because the patrolman's order was not made for the purpose of facilitating the flow of traffic over the highway but instead was made for the purpose of preventing the commission of a different offense which is punishable by another statute.

Moreover under the facts presented the disobedience of the order of the patrolman occurred subsequent to the order and apparently not in the presence of the patrolman. We conclude that the charge under Section 43.170 would not properly lie under the facts.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

HLM:aa



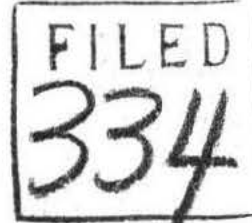
CONSTITUTIONAL LAW: General Assembly can reapportion House of Representatives but cannot delegate such authority to commissions. House of Representatives of any size may be created by Constitutional Amendment.

GENERAL ASSEMBLY:

ELECTIONS:

ELECTION DISTRICTS:

August 27, 1965



Honorable Warren E. Hearnes  
Governor of Missouri  
Executive Office  
Jefferson City, Missouri

Dear Governor Hearnes:

This is in answer to your opinion request of recent date.  
You ask the following questions:

1. Can the General Assembly provide for reapportionment of the Missouri House of Representatives by statute and, if so, can such a statute provide for the creation of a commission to establish the election districts for members of the House of Representatives.
2. Is there any limitation on the number of members of the House of Representatives if an amendment is passed providing for a specific number of members of the House of Representatives and providing that the election districts from which such members shall be elected shall be created by a bipartisan commission.

In the case of *Jonas v. Hearnes*, 236 F. Supp. 699, a three judge Federal Court held that the provisions of Section 2 of Article III of the Constitution of Missouri and Section 22.040, RSMo, are invalid because such provisions are repugnant to the Federal Constitution. The Court said l.c. 707:

"However, it is apparent under these guidelines and principles that Section 2 of Article III of the Constitution of the State of Missouri and the reapportionment statute pursuant thereto, RSMo 1959, § 22.040, V.A.M.S., are violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution."

Obviously, under such ruling the provisions of Section 9 of Article III of the Constitution allocating representatives to the various counties and the City of St. Louis "until reapportionment can be made in accordance" with Article III of the Constitution are also invalid as contravening the Federal Constitution.

Honorable Warren E. Hearnes

The Court, however, specifically held that the provisions of Section 3 of Article III of the Constitution and Section 22.050, RSMo, providing for apportioning counties entitled to more than one representative and the City of St. Louis by local bodies are not, as such, repugnant to the United States Constitution. The Court said l.c. 707:

"\* \* \* Section 3 of Article III, relating to districts within a county, and the reapportionment statute pursuant thereto, RSMo 1959, § 22.050, V.A.M.S.; on their face are not constitutionally void, and are susceptible to being worked into a constitutionally permissible scheme of apportionment. \* \* \*"

In view of the Federal Court's holding that the provisions of Section 2 of Article III of the Constitution and Section 22.040, RSMo, are invalid, it is our view that the Legislature can enact a statute creating districts for the House of Representatives so long as such statute does not contravene any provision of the Missouri Constitution not held invalid by the Federal Court provided that such districts meet the requirements of the United States Constitution.

Section 9 of Article III, of the Constitution contains the following language:

"Until apportionment of the representatives can be made in accordance with this article, the house of representatives shall consist of one hundred fifty-four members apportioned among the several counties as follows: \* \* \*"

In the event the Legislature chose to district the House of Representatives by Statute, it would appear that the Legislature might be limited to one hundred fifty-four members of the House of Representatives.

Section 1, Article III, of the Constitution of Missouri provides as follows:

"The legislative power shall be vested in a senate and house of representatives to be styled 'The General Assembly of the State of Missouri.'"

Enactment of a statute providing for districts for members of the House of Representatives is a Legislative function.

Honorable Warren E. Hearnes

In the case of State ex rel. Scott et al. v. Calcaterra et al., 362 Mo. 1143, 247 S.W. 2d 728, a case involving the creation of senatorial districts in St. Louis City by the St. Louis City Board of Election Commissioners, under the provisions of Section 8 of Article III of the Constitution, the Supreme Court held that the creation of such districts is legislative in nature, stating S.W. 2d 1.c. 731:

"\* \* \* Traditionally, such a function as that here involved has always been regarded as legislative. State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40. Indeed, the authority for the board to divide the territory of the City of St. Louis is found in the legislative article of the Constitution, which is Article III. It is too clear for argument that in so acting respondents were performing a legislative function, and we so hold."

In the case of State ex rel. Dunne et al. v. Mooney et al., 362 Mo. 1128, 247 S.W. 2d 722, the Supreme Court held that the creation of senatorial districts by the St. Louis County Council was the performance of a legislative function under Section 8 of Article III of the Constitution, stating S.W. 2d 1.c. 724:

"[1] It is conceded by all parties that the redistricting of St. Louis County into senatorial districts is a legislative function. With this we agree. State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40."

In the case of State ex rel. McNary et al. v. Mooney et al., 362 Mo. 1139, 247 S.W. 2d 726, the Supreme Court held that the creation by the County Council of St. Louis County of districts for the election of members of the House of Representatives under Section 3 of Article III of the Constitution is a legislative act. The Court said S.W. 2d 1.c. 728:

"[1] It is conceded by the parties that the redistricting of St. Louis County into representative districts, as provided in Article III of our Constitution is a legislative function. State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40. \* \* \* \*"

In the case of State ex rel. Gordon v. Becker, 329 Mo. 1053, 49 S.W. 2d 146, the Supreme Court held apportionment of senatorial districts under the provisions of Section 7 of Article IV of the Constitution of 1875 was a legislative act. Such constitutional provision provided for apportionment by the General Assembly after each decennial census. The Court said S.W. 2d 1.c. 148:

"[4] In this brief discussion it has been assumed that the apportionment of the state into districts for the election of Senators is a legislative act, whether done by the General Assembly or by designated state officers. That the performance of that act calls for the exercise of legislative power is no longer open to question. State ex rel. Carroll v. Becker (Mo. Sup.) 45 S.W. (2d) 533.  
\* \* \* \*

In the case of State ex rel. Carroll v. Becker, 329 Mo. 501, 45 S.W. 2d 533, a case involving congressional redistricting, the Supreme Court said S.W. 2d 1.c. 537:

"Further, dividing a state into political subdivisions, or creating territorial districts of any kind, is a legislative act. Haeussler v. Bates, 306 Mo. loc. cit. 411, 267 S.W. 632. This court said in State ex rel. v. Hitchcock, 241 Mo. loc. cit. 457, 146 S.W. 40, 48, 'that the districting of the state into legislative, senatorial, congressional, and judicial districts is the exercise of legislative authority cannot be successfully questioned.'

"That case concerned the state senatorial districts, and it might be claimed that the mention of congressional and judicial districts is obiter. Yet the same principle would apply. It is a legislative act. That case was quoted and approved in State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017. While there were dissenting opinions as to the result in the latter case, the principle was not questioned that dividing the state into districts is a legislative act."



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In the case of State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017, the Supreme Court said S.W. 1.c. 1023:

"\* \* \* All concede, and, if not, the cases and the Constitution so hold, that the redistricting of the state is a legislative act. \* \* \* \*"

In the case of State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W.40, the Supreme Court said, in a case involving the senatorial redistricting of St. Louis City under the 1875 Constitution by the circuit judges of such city, S.W. 1.c. 48:

"[1] That the districting of the state into legislative, senatorial, congressional, and judicial districts is the exercise of legislative authority cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the United States government. \* \* \* \*"

The concurring opinion in such case stated S.W. 1.c. 66:

"\* \* \* The duty so imposed, although it is laid on the circuit court, is not judicial in its character, and could not be imposed on the court by any authority less than the Constitution itself. The duty is purely legislative in its character, and could be performed only by the General Assembly, but for the express provision referred to. \* \* \* \*"

Since the creation of representative districts is legislative, the power is in the General Assembly to provide by statute for such districts because there is no valid provision in the Missouri Constitution providing for the creation of such districts.

In the case of State ex rel. Gordon v. Becker, supra, the Court said S.W. 2d 1.c. 147:

"[1,2] All the sovereign power of this state, except the portion delegated to the general government, rests with the people of the state. They may at their pleasure grant or withhold such power, or having granted it to the agencies



Honorable Warren E. Hearnes

which they have set up for their own government, they may withdraw all or any part of it, through the medium of their organic law. By section 1, above, they granted the legislative power to the General Assembly, subject to the limitations contained in the Constitution. The grant would have been no broader had the words, 'subject to the limitations herein contained,' been omitted, because, broadly speaking, all the parts of state Constitutions, following the general grants of powers to certain state agencies which they create, are but limitations upon those powers, directly or indirectly. \* \* \* \*

In the dissenting opinion of Judge Atwood in such case, it is stated S.W.2d 1.c. 155:

"\* \* \* 'The test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do.' \* \* \* "

In the dissenting opinion of Judge Frank, it is stated S.W.2d 1.c. 161:

"Section 1 grants to the General Assembly all legislative power of the state, subject to the limitations contained in the Constitution. Absent some limitation on this unqualified grant of power, no agency other than the General Assembly would have power to redistrict the state. \* \* \* "

Since there is no valid constitutional provision granting the power to create representative districts except Section 3 of Article III of the Constitution, it is apparent that the Legislature has power to create by statute representative districts.

In view of the holding of the Federal Court that Section 3 of Article III of the Constitution is not contrary as such to the Federal Constitution, the proper body in the counties entitled to more than one representative and the City of St. Louis is given the constitutional power to apportion such counties and the City of St. Louis and the legislature is under the Constitution not authorized to apportion representatives to counties entitled to

Honorable Warren E. Hearn

more than one representative or the City of St. Louis and has no power to create representative districts in such counties or the City of St. Louis. In counties where a fractional district would remain after allocating more than one representative to such counties the General Assembly should include such fractional district in creating districts under the power of the General Assembly and the body authorized by the Constitution to redistrict counties entitled to more than one representative should apportion the remaining district in such counties.

It is our view, however, that the Legislature must create districts by statute and cannot delegate to any commission or other body the power to create such districts. As pointed out above, the power to create representative districts is exclusively legislative. It is our view that the General Assembly has no power to delegate such legislative function to another body but must exercise such exclusive legislative authority itself.

In the case of *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, the Supreme Court said S.W. 2d 1.c. 545:

"\* \* \* It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. 11 Am. Jur. 921, Sec. 214; 16 C.J.S. Constitutional Law, § 133; *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947. \* \* \*"

This is not a case where a commission or other body is created to carry out the details of the legislative enactment set out in the statute but the creation of representative districts by a commission, would be a legislation by the commission or other body created by the statute and would, therefore, be constitutionally prohibited. The Legislature cannot by statute divest itself of the power and duty to carry out the purely legislative function of creation of representative districts.

It was held in the case of *State ex rel. Gordon v. Becker*, supra, 49 S.W. 2d 146, that the referendum provisions of the Constitution of 1875 (now Section 52a, Article III of the Missouri Constitution) except as otherwise provided in the Constitution are applicable to statutes apportioning the State into legislative districts. Section 52a of Article III provides as follows:

"A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded."

The Court said S.W. 2d 1.c. 148:

"\* \* \* Manifestly the framers of the Amendment of 1908 intended, as did the people in adopting it, that every vestige of legislative power granted directly by the Constitution itself to agencies of the state government, the exercise of which would affect the state as a whole, should be subject to its initiative and referendum provisions. \* \* \*"

"[3] Did the people in adopting the Amendment of 1908 intend to make all legislative acts affecting the state as a whole, including the acts making apportionment of the state for the election of senators, subject to the referendum? The language, 'The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives,' was used for some purpose; it cannot be disposed of by saying that the framers of the amendment blindly copied it from the Constitution of Oregon, wholly disregarding the existing provisions of our own Constitution. \* \* \*"

In the concurring opinion it was stated S.W. 2d 1.c. 150:

Honorable Warren E. Hearnes

"The people 'reserve to themselves' the power regarding, not merely laws which are or might be enacted by the General Assembly, but laws covering every subject of legislation. By that amendment they take back, reassume, all legislative authority theretofore granted, with the general grant as before to the General Assembly, and the additional limitation of initiative and referendum. Can it be doubted that the initiative and referendum apply to every subject and method of legislation? The people reserve to themselves the unlimited power to redistrict the state, to control such legislation as they do all other legislation. The method provided is by initiative and referendum; the latter applying only to acts of the General Assembly. \* \* \* \*"

Since the referendum is limited to acts of the General Assembly and since the Supreme Court has held that except as otherwise provided in the Constitution, a statute creating legislative districts is subject to the referendum, a statute delegating to a commission or other body the power to reapportion legislative districts would be unconstitutional because such redistricting could not be referred to the people for their approval or rejection.

A bipartisan commission with the authority and duty to establish election districts for members of the house of representatives of this State can be provided for only by amendment of the Missouri Constitution.

Provision for senatorial apportionment in this State by a bipartisan commission is now found in Section 7 of Article III of the Missouri Constitution. The Federal Court in the case of Jonas vs. Hearnes, supra, held that the only defect in such Section of the Constitution is the provision allowing a permissible one-fourth variation in the population of the districts from the quotient arrived at by dividing the population of the State by thirty-four, the number of members of the Missouri Senate.

If, therefore, a bipartisan commission to create election districts for members of the house of representatives is provided for by a constitutional amendment, such commission will have authority to establish election districts for the members of the house of representatives. If Section 3 of Article III of the Constitution

Honorable Warren E. Hearnnes

is repealed, the adoption of an amendment authorizing a bipartisan commission to create election districts for members of the house of representatives would give such commission power to create such districts throughout the entire State.

Your second question asks whether there is any restriction on the size of a House of Representatives that might be provided for by a constitutional amendment.

We are of the opinion that there is no limitation on the size of the House of Representatives that may be provided for by a constitutional amendment. There is no provision in the Constitution of the United States as to the size of either house of the legislature of a state.

There is no valid provision in the state constitution which prevents the creation by a constitutional amendment of a House of Representatives of any size thought proper and desirable.

#### CONCLUSION

(1) It is the opinion of this office that the General Assembly of Missouri can by a statute provide for election districts for members of the House of Representatives, but the General Assembly cannot by statute delegate such authority to a commission or other body, because granting authority to such commission to create election districts would be an unconstitutional delegation of legislative power which can be exercised only by the General Assembly.

(2) A bipartisan commission with authority to create election districts for members of the House of Representatives can be established only by an amendment of the Missouri Constitution.

(3) A Constitutional Amendment may provide for a House of Representatives of any size.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



October 7, 1965



Mr. Glennon T. Moran, Supervisor  
Department of Liquor Control  
State of Missouri  
Jefferson City, Missouri 65102

Dear Mr. Moran:

This is in answer to your request for an opinion on two questions concerning wholesale-retail relationships.

The first question reads as follows:

"1. With the purchase of 5% Debenture Bonds by the retailer issued by the wholesaler, does such an interest on the part of the retailer in the wholesaler disqualify the wholesaler under the provisions of Section 311.070 RSMo. 1959?"

You subsequently advised us that the wholesale grocer has a five percent wholesale solicitors license.

The applicable part of Section 311.070, supra, reads as follows:

"1. Distillers, wholesalers, wine makers, brewers or their employees, officers or agents, shall not, under any circumstances, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers."

In *Northcutt v. McKibben*, Mo. App., 159 S.W. 2d 699, the court said this about the purpose of the statute, l.c. 705:

Mr. Glennon T. Moran

"It was clearly designed to remove the retail dealer of intoxicating liquors from all obligations in a financial or business sense to the wholesaler, except ordinary commercial credit for liquors sold to such retail dealers."

Here the wholesaler has no interest whatsoever in the retail business. A debenture bond is merely evidence of a debt and the retailer is merely a creditor of the wholesaler. The retailer is not obligated in a financial or business sense to the wholesaler.

Therefore, it is our opinion that a retailer purchasing five percent debenture bonds does not violate Section 311.070, supra.

The second question reads as follows:

"2. When a wholesale grocer passes on to its retail affiliates all advertising rebates and quantity purchase discounts in the grocery industry pursuant to a contract between the wholesaler and retailer, is such action violative of Section 311.070?"

Our answer to this second question is based on the general hypothetical question posed and not on any specific discount or rebate agreement. We also assume that the wholesaler has no financial interest in the retail affiliates. Otherwise there would be a violation of Section 311.070, supra.

This second question, then, would be covered not by Section 311.070, supra, but by Section 311.332, RSMo 1959. This section reads as follows:

"It shall be unlawful for any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in excess of five per cent by weight to persons duly licensed to sell such intoxicating liquor and wine at retail, to discriminate between retailers or in favor of or against any retailer or group of retailers, directly or indirectly, in price, in discounts for time of payment, or in discounts on quantity of merchandise sold, or to grant directly or indirectly, any discount, rebate, free goods, allowance or other inducement, excepting a discount not in excess of one per cent for

Mr. Glennon T. Moran

quantity of liquor and wine, and a discount not in excess of one per cent for payment on or before a certain date."

The Liquor Control Act is "a comprehensive scheme for the regulation and control of the manufacture, sale, possession, transportation and distribution of intoxicating liquor." John Bardenheier Wine & Liquor Co. v. City of St. Louis, 345 Mo. 637, 135 S.W. 2d 345.

It is our opinion that Section 311.332, supra, applies only to sales of intoxicating liquor and does not apply to sale of groceries generally. Therefore, under Section 311.332, supra, any quantity purchase discount agreements for intoxicating liquor would be regulated and any rebates for liquor advertisement would be prohibited.

This opinion does not preclude in a particular situation the Supervisor of Liquor Control from finding that either grocery discounts or grocery advertising rebates are being used as a subterfuge to indirectly grant discounts or rebates for liquor purchases.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

COUNTY CLERKS: Under Senate Bill 91 (Section 51.300  
COUNTY CLERKS SALARIES: V.A.M.S.) the change of salaries of  
COUNTY OFFICERS: County Clerks in third class counties  
SALARIES OF COUNTY CLERKS: is effective January 1, 1967.

OPINION NO. 339

October 21, 1965

Honorable G. Stafford Owen  
State Representative  
DeKalb County  
Maysville, Missouri



Dear Representative Owen:

This letter is in answer to your request for a legal opinion as to whether or not the salary change for clerks of county courts of third class counties, contained in Senate Bill No. 91 of the 73rd General Assembly, (Section 51.300 V.A.M.S. Sept. 1965 pamphlet), will be effective during the present terms of such clerks.

Senate Bill No. 91 of the 73rd General Assembly of Missouri, repealed Section 51.300, RSMo 1959, and enacted a new section in lieu thereof, to be known as Section 51.300. Section 51.300 as amended provides:

"1. The clerk of the county court of each county of the third class shall receive a salary as follows:

- (1) In counties with a per capita assessed valuation of less than seven hundred dollars, the sum of five thousand two hundred and sixty dollars;
- (2) In counties with a per capita assessed valuation of seven hundred dollars and less than one thousand dollars, the sum of four thousand one hundred seventy dollars;
- (3) In counties with a per capita assessed valuation of one thousand dollars and less than one thousand three hundred dollars, the sum of five thousand four hundred and eighty dollars;
- (4) In counties with a per capita assessed valuation of one thousand three hundred dollars or over, the sum of six thousand three hundred and sixty dollars.

"2. The per capita assessed valuation of each county shall be determined on or before January 1, 1967, and each year thereafter for the purposes

Honorable G. Stafford Owen

of subsection 1 and shall be based on the last decennial census.

"3. In addition to the salaries fixed under this section the clerk shall receive annually the compensation provided by section 50.810, RSMo. As amended Laws 1959, S. B. No. 63, § 1; Laws 1965, p. \_\_\_\_\_, S. B. No. 91, § 1."

The section affords an increase in salary for some clerks while other clerks shall receive a salary less than they are presently receiving under repealed Section 51.300.

Attention is directed to Article VII, Section 13, Constitution of Missouri which provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This provision is applicable to clerks of county courts of all third class Missouri counties. However, it has been held that such constitutional prohibition does not apply and a public officer may receive additional compensation during his term of office when the law imposes new duties upon him and increased compensation may be given him for the performance of new duties. Mooney v. St. Louis County, 286 S.W. 2d 763.

Senate Bill No. 91 does not impose any new duties upon county clerks of third class counties. Consequently if the act provided for an increase during the term of office of county clerks occupying such office when the law became effective those county clerks who would be entitled to an increase in salary under the Bill would be prohibited by the above mentioned constitutional provision from receiving same during their present terms of office.

As shown, the salaries of county clerks of third class counties are based upon a determination made of the per capita assessed valuation of such counties, under provisions of the Bill. Said Bill became effective on October 13, 1965, and provided that the determination shall be made initially on or before January 1, 1967.

It is clear from the provisions of Senate Bill No. 91 that the determination of salaries of county clerks of the third class counties to be made by the county courts "on or before January 1, 1967" is for determination of the salaries of county clerks for the year 1967 and not for a prior year or period. The legislative intent is clear and the date of January 1, 1967, is the last date upon which a determination can be made, but whether made on January 1, 1967 or prior thereto the salary so determined is for the year 1967.

This legislative intent appears to be confirmed by the provisions of Senate Bill No. 90 (Section 51.285 V.A.M.S. Sept. 1965 Supp.) which expressly authorizes compensation for extra duties



Honorable G. Stafford Owen

provided therein for County Clerks of Class I, Class II and Class IV Counties only for the years 1965 and 1966. This makes clear that the legislature did not intend Senate Bill No. 91 to become operative until January 1, 1967.

The provisions of Senate Bill No. 90 are for establishing in part the salaries of county clerks during the temporary period only until the provisions of Senate Bill No. 91 becomes effective in establishing such salaries in a comprehensive statutory scheme under which the first determination is to be made of salaries for the year 1967.


Since the terms of county clerks in third class counties will expire December 31, 1966, no change in salaries of such clerks is provided for in Senate Bill No. 91 during their present terms of office.

#### CONCLUSION

Therefore, it is the opinion of this office that Senate Bill No. 91, of the 73rd General Assembly (Section 51.300 V.A.M.S. Sept. 1965 pamphlet), which provides for the salaries of clerks of county courts of third class counties to be in certain sums according to the per capita assessed valuation of the county as determined by the county court and as therein provided authorizes the first determination to be made on or before January 1, 1967 and such change of salary shall be effective for the year 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

November 24, 1965



Honorable Don E. Burrell  
Greene County Prosecuting Attorney  
Springfield, Missouri 65802

Dear Mr. Burrell:

This letter is in response to your request for an opinion of this office on two questions concerning "The Public Libraries of Springfield and Greene County." As indicated by the contract between the Springfield Free Public Library and Greene County Library District of September 26, 1960, and the joint resolution between the Boards of Trustees of the Springfield Public Library and the Greene County Library, the said Greene County Library and Springfield Library have been cooperating and running a joint operation, known as "The Public Libraries of Springfield and Greene County." You inquire first, whether this joint operation would expose either the Greene County Library Board or the Springfield Public Library to liability in case of injury, accidental death, etc., to a person who was on the premises of one of the libraries, and second, whether the employees of the joint library would be eligible under a city pension plan.

As to the tort liability of the enterprise, a county library board, being an agency of the state, is not liable to suit for torts without the consent of the state, when such agency is acting in a governmental capacity, *Kleban v. Morris*, 363 Mo. 7, 247 S.W. 2d 832. The same is true of a city library, *Hiltner v. Kansas City, Mo.*, 293 S.W. 2d 422. The operation of a library is a governmental function, because it is an exercise of the power to promote the general public welfare, peace, health or well being of the citizens of the state at large, *State ex rel. Carpenter v. City of St. Louis, Mo.*, 2 S.W. 2d 713.

Honorable Don E. Burrell

The fact that the Springfield City Library and the Greene County Library have combined operations does not create any new liability that did not before exist.

Hence, The Public Libraries of Springfield and Greene County is immune from tort liability and has no obligation to carry liability insurance.

With respect to the eligibility of employees of the public libraries of Springfield and Greene County under a city pension plan, we refer to the next-to-last paragraph of the joint resolution between the boards of trustees of the Springfield Library and the Greene County Library, which reads:

"RESOLVED: That all County Library employees shall be hired by the Springfield Public Library in the grade and longevity listed elsewhere and that all other conditions of employment be equal with those of the original staff of the Public Library and that the fringe benefits, vacations and sick leave be computed from the date of original employment by the Greene County Library."

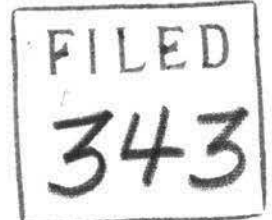
The quoted paragraph apparently means that the Springfield Public Library becomes the employer of all employees of The Public Libraries of Springfield and Greene County. If all employees of the Public Libraries of Springfield and Greene County are employees of the City, whether or not the employees of The Public Libraries of Springfield and Greene County would be eligible under a city pension plan is a matter to be decided by the city, and is not the concern of the County Library Board. Hence, coverage of such employees should be determined by the city.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj

September 9, 1965



Mr. Eugene P. Walsh  
Legal Assistant  
Executive Office  
Jefferson City, Missouri

Dear Mr. Walsh:

In your letter of August 30, 1965, you requested an opinion from this office as follows:

"This office has received a request to appoint and commission a notary in a place other than her place of residence, to-wit: her place of employment in a county office.

"May this be done under the provisions of Section 485.020?"

Section 486.010, RSMo 1959, provides in part that the Governor can appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public who may perform all duties of such office in the county for which such notary is appointed and in adjoining counties. It further provides that no person shall be appointed a notary public who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state.

Section 486.040, RSMo 1959, provides as follows:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public', the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence."

(Emphasis supplied)

Mr. Eugene P. Walsh

In *Silver v. Kansas City, St. Louis & Chicago Railway Company*, 21 Missouri Appeals 5, l.c. 9, the court stated:

" \* \* \* Under our statute a notary public can only transact his official business in the county for which he was appointed and in which he resides. \* \* \* "

The above decision was rendered in 1886, the statutes in effect at that time are found in Chapter 134, Laws of Missouri, 1879. Since the above decision was rendered, the statutes have been amended to permit a notary public to perform official acts in the county in which he was appointed and in adjoining counties; and, effective October 13, 1965, he may perform official acts in any other county in the state in which he has previously filed a certified copy of his appointment. With this exception, the statutes remain in substantially the same language as when this opinion was rendered. They are now found in Chapter 486, RSMo 1959.

In construing two or more statutes relating to the same subject, they should be read together and harmonized so as to give force and effect to each section. *Powers v. Johnson*, 306 SW 2d 616.

Section 486.010, RSMo 1959, requires a notary public to be a citizen of the United States and of this state. It is silent on the question of residence. However, Section 486.040 requires each notary to have a notary seal with his name inscribed thereon together with the name of the county or city in which he resides and has his office, and the name of the state. Considering these statutes together we believe it was intended for the notary public to reside and have his office in the county in which he is appointed and commissioned.

It is the opinion of this office that a person can be appointed and commissioned as a notary public only in the county or city in which he resides.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

MM/jlf



October 26, 1965



Honorable John L. Woodward  
Prosecuting Attorney  
Crawford County  
Steelville, Missouri

Dear Mr. Woodward:

This is in answer to your request for an opinion which reads as follows:

"Will you please advise me whether or not it is your opinion that R.S.Mo 563.721 would prohibit the sale at auction of household furnishings, appliances and other items ordinarily found in the home, if such sale was held at the residence of the owner, on Sunday?"

The applicable parts of Section 563.721, RSMo Cum Supp 1963, read as follows:

"1. Whoever engages on Sunday in the business of selling or sells or offers for sale on such day, at retail, motor vehicles; clothing and wearing apparel; clothing accessories; furniture; housewares; home, business or office furnishings; household, business or office appliances; hardware; tools; paints; building and lumber supply materials; jewelry; silverware; watches; clocks; luggage; musical instruments and recordings or toys; excluding novelties and souvenirs; is guilty of a misdemeanor and shall upon conviction for the first offense be sentenced to pay a fine of not exceeding one hundred dollars, and for the second or any subsequent offense be sentenced to pay a fine of not exceeding two hundred dollars or undergo confinement not exceeding thirty days in the county jail in default thereof.

Honorable John L. Woodward

"2. Each separate sale or offer to sell shall constitute a separate offense."

Generally, in construing statutes, the legislative intent should be ascertained from the words used, if possible, and in doing so give to such words their plain and ordinary meanings so as to promote the object and manifest purpose of the statute. Baker v. Brown's Estate, 365 Mo. 1159, 294 S.W. 2d 22.

It is plain from the statute that retail sales on Sunday of certain prescribed goods are prohibited.

Retail is defined by Black's Law Dictionary, 4th Edition, as follows:

"To sell by small quantities, in broken lots or parcels, not in bulk, to sell direct to consumer."

Auction is defined by Black's Law Dictionary, 4th Edition as:

"A public sale of land or goods, at public outcry, to the highest bidder."

It is our opinion that the auction described in your letter is a sale at retail prohibited by the statute if the statute applies to a homeowner making the sale.

The statute uses the word "or" when naming those persons covered by the statute. Ordinarily the use of the word "or" is meant to be in the disjunctive. Norberg, v. Montgomery, 351 Mo. 180, 173 S.W. 2d 387.

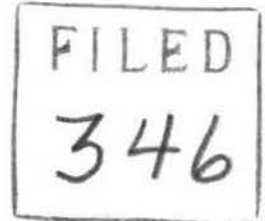
It is our opinion that any person who sells the listed items at retail on Sunday violates the statute, regardless of whether that person is ordinarily in the retail business or just makes one sale. Subsection 2 of the statute bears this out by making each separate sale a separate offense.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

December 21, 1965

Opinion No. 346  
Answered By Letter  
(Mansur)



Honorable Dan Bollow  
Prosecuting Attorney  
Shelby County  
Shelbyville, Missouri

Dear Mr. Bollow:

In your letter of September 1, 1965, you requested an opinion from this office as follows:

"I am requesting an official opinion in regard to the following matter. A court reporter was on assignment in a civil case, accompanying the judge who had been assigned to hear said cause out of his circuit. When the adoption matter was completed the attorney for one of the interested parties requested permission for said party to appeal as a poor person. The circuit judge granted said request and thereupon the court reporter entered on her duties of preparing the transcript for appeal. Thereafter the appellant applied for an extension of time in which to file a transcript and such application was denied and appellant's appeal dismissed. At the time of the ruling the transcript had been prepared, the court reporter having prepared the transcript in this civil cause without receiving any compensation therefore.

"My question is whether or not it is the duty of the county court of that county in which the trial was held to compensate the court reporter for the preparation of this transcript. I am informed that Paul Hess of

Honorable Dan Bollow

Macon County received an official opinion last year on a question that might have been similar, and if you think that opinion covers the above case then please forward it to me. If, however, the fact that the appeal was dismissed in any way changes that opinion please send me an official opinion."

I am enclosing herewith an opinion issued by this office July 31, 1964, to Honorable Paul D. Hess, Prosecuting Attorney, Macon County, Macon, Missouri, holding that a circuit court judge may allow a defendant in a civil suit to appeal as a poor person and have the cost of the transcript for appeal paid by the county.

Supreme Court Rule 11.02, regarding powers of circuit judges that are transferred, states:

"A judge so transferred, during the period designated shall possess the same powers and be liable to the same responsibilities as a judge of the court to which he is transferred."

Section 485.055, RSMo 1959, provides in part that official court reporters that are transferred shall perform the same duties, make the same charges for their services, and be subject to the same laws and rules while acting as such transferred reporter as though they were the regularly appointed official reporters of the court to which they were temporarily appointed.

It is our opinion that a Circuit judge on assignment to another circuit has the same powers and authority as the regular judge, including the authority to order a transcript of the record to be prepared and the cost thereof to be paid by the county where the trial is held, upon proper voucher approved by the Circuit judge. The fact that the appeal was dismissed in no way affects the power of the Circuit judge to order the transcript or to order the reporter to be compensated therefor.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

By  
Moody Mansur  
Assistant Attorney General

Encl. Opinion #226 (1964)

PUBLIC ADMINISTRATOR: With respect to the qualifications of public administrator: (1) Article VII, Section 8, of the Constitution of 1945 requiring that the public administrator be a citizen of the United States, and a resident of this state one year next preceding his election. (2) The provisions of Section 473.117, paragraph 1, RSMo 1959, relative to persons disqualified from administering estates, and Section 475.055, paragraph 2, RSMo 1959, relative to the qualifications of guardians apply to the office of public administrator.

September 22, 1965

OPINION NO. 347

Honorable Thomas G. Woolsey  
State Senator, 33rd District  
Mason Building  
Versailles, Missouri



Dear Senator Woolsey:

This opinion is in response to your request of September 1, 1965, in which you inquire as to the qualifications for the office of public administrator in general, and as to the minimum age requirement, particularly in a fourth-class county.

The office of public administrator was created by the Legislature and as such is not a constitutional office. The provisions relating to this office are contained within Sections 473.730 to 473.773, RSMo 1959.

The public administrator, however, is a public officer and is specifically declared to be an officer for the county in which he is elected. Section 473.737, RSMo 1959, provides in part, in that respect, as follows:

"Each public administrator elected, as now or as hereafter provided for in Sections 473.730 to 473.767, is hereby declared to be an officer for the county in which he is elected and for the city of St. Louis, if elected therein."

As a public officer, therefore, the constitutional provisions governing his qualifications are contained within Article VII, Section 8 of the Missouri Constitution of 1945, which states:

"No person shall be elected or appointed to any civil or military office in the state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding



Honorable Thomas G. Woolsey

his election or appointment, except that the residence in this state shall not be necessary in case of appointment to administrative positions requiring technical or specialized skill or knowledge."

This section therefore requires that the public administrator shall have resided in this state for one year next preceding his election and that he be a citizen of the United States.

Although the sections we have cited relative to the office of public administrator do not set forth the necessary qualifications, we nevertheless note that Section 473.750, RSMo 1959, indicates that other chapters and their provisions are pertinent to the office of public administrator. Section 473.750 is as follows:

"In addition to the provisions of Section 473.730 to 473.767, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions and proceedings as are enjoined upon or authorized against executors and administrators, guardians and curators by chapters 472 to 475, RSMo, so far as the same may be applicable. He shall have power to administer oaths and affirmations in all matters relating or belonging to the exercise of his office."

In that respect, we note that Section 473.117, RSMo 1959, sets out concisely the persons disqualified from administering. Section 473.117, paragraph 1, states:

"1. No judge or clerk of any probate court, in his own county, or his deputy, no person under twenty-one years of age, or of unsound mind, no habitual drunkard, and, except as otherwise provided by law, no person who is a non-resident of this state, shall be executor or administrator. No executor of an executor, in consequence thereof, shall be executor of the first testator."

In addition, Section 475.055 RSMo 1959, states in part as follows:

"2. No judge of the probate court or sheriff or clerk of the probate court or deputy of either in his own county, no person under twenty-one years of age, other than as provided in subsection 1, or of unsound mind, no habitual drunkard or narcotic addict and, except as otherwise provided by law, no person who is a nonresident of this

Honorable Thomas G. Woolsey

state, shall be appointed guardian of the person  
or of the estate. \* \* \* \*

The exception contained in the above paragraph following the provision disqualifying persons under twenty-one years of age applies only to the appointment of a parent who is a minor.

The statutes do not draw any distinction in the qualifications for the office of public administrator insofar as the classification of counties is concerned.

#### CONCLUSION


It is therefore the opinion of this office that:

(1) The public administrator is by law a public officer and, as such, must meet requirements of Article VII, Section 8, of the Missouri Constitution of 1945 and be a citizen of the United States, and a resident of this state one year next preceding his election.

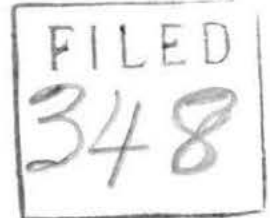
(2) The provisions of Section 473.117, paragraph 1, RSMo 1959, relative to persons disqualified from administering estates, and Section 475.055, paragraph 2, RSMo 1959, relative to the qualifications of guardians apply to the office of public administrator and, in addition to the other persons therein disqualified, no person under twenty-one years of age may occupy such office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

September 8, 1965



Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri

Dear Mr. Holman:

This is in answer to your request for an opinion on the following question:

"Would the rulings as set forth in Opinion No. 370, dated December 21, 1962, also apply to radio operators appointed by a sheriff of a third class county and receiving compensation from county revenue, when no order has been made by the Circuit Judge approving the appointment or setting the salary of said radio operators?"

Opinion No. 370, 1962, a copy of which is enclosed, held that under Section 57.250, RSMo 1959, sheriffs of third and fourth class counties may not appoint deputies and assistants until the Circuit Judge has approved. And, until such approval the County Court may not pay such deputies and assistants.

Opinion No. 370 answered a request concerning a third class sheriff employing a bookkeeper. That opinion also applies to your situation.

That is, a radio operator is such an assistant under Section 57.250, supra, that the County Court may not pay such person until the Circuit Judge has approved his appointment.

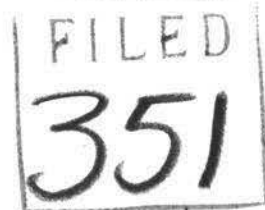
Very truly yours,

NORMAN H. ANDERSON  
Attorney General

HOSPITAL DISTRICTS: A hospital district, duly organized  
TAXATION: has authority to levy taxes under the  
provisions of Chapter 206 before a  
hospital is actually constructed and operating. Such funds  
can be used to buy land for the hospital site, construct the  
hospital and/or other purposes set out in Section 206.110  
RSMo., Cum. Supp. 1963.

OPINION NO. 351

December 2, 1965



Honorable William Baxter Waters  
State Senator, 17th District  
First National Bank Building  
Liberty, Missouri

Dear Senator Waters:

This opinion is given in response to your questions based  
on the following facts as restated by this office:

The Liberty Hospital District of Clay  
County was duly created under Chapter  
206, Cum. Supp. RSMo 1963. Directors  
had been elected, qualified and meet-  
ings held. No hospital has been auth-  
orized nor any hospital operated in the  
district by the board.

By your amending letter sent to this office, you state  
that taxes have never been levied by the board. The funds  
expended so far by the board have come from a federal plan-  
ning grant. You also stated the bond issue to construct a  
hospital was presented to the public but was voted down.

Based on these facts, you submitted two questions which  
we understand to be as follows:

1. Does the statute authorize the col-  
lection of a tax before a district hos-  
pital is actually in operation?
2. If the above question is answered in  
the affirmative can the money so raised  
by taxes be used for any of the purposes  
enumerated in Section 206.110 to include

Honorable William Baxter Waters

the purchase of land for the site of a hospital.

Considering your questions seratim, your first question is answered in the affirmative.

A tax may not be levied unless expressly authorized by statute, "No statute, no tax". When authorized, a tax may be levied only within the terms of the statute (State ex rel v. Missouri Valley Drainage District of Holt County, 185 S.W. 2d 800, 802).

Section 206.060, RSMo., Cum. Supp. 1963, provides in part as follows:

"The notice shall further state that any district upon its establishment shall have the powers, objects and purposes provided by this chapter, and shall have the power to levy a property tax not to exceed fifteen cents on the one hundred dollars valuation."  
(Underscoring supplied)

Section 206.110, RSMo., Cum. Supp. 1963, reads in part as follows:

"A hospital district shall have and exercise the following governmental powers, and all other powers incidental, necessary, convenient or desirable to carry out and effectuate the express powers:

(1) To establish and maintain a hospital and hospital facilities within its corporate limits, and to construct, acquire, develop, expand, extend and improve any such hospital or hospital facility.

(2) To acquire land in fee simple, rights in land and easements upon, over or across land and leasehold interests in land and tangible and intangible personal property used or



useful for the location, establishment, maintenance, development, expansion, extension or improvement of any hospital or hospital facility. The acquisition may be by dedication, purchase, gift, agreement, lease, use or adverse possession or by condemnation.

\*\*\*\*\*

(5) To borrow money and to issue bonds, notes, certificates, or other evidences of indebtedness for the purpose of accomplishing any of its corporate purposes, subject to compliance with any condition or limitation set forth in this chapter or otherwise provided by the constitution of the state of Missouri.

The above section provides in its preamble that the district "shall have the following governmental powers and all other powers incidental, necessary, convenient or desirable to carry out and effectuate the expressed powers" (which are thereafter enumerated).

In construing the statutes, we must first seek the lawmakers intention for the whole act and if possible to effectuate that intention (Kirkwood Drug Company v. City of Kirkwood, 387 S.W. 2d 550, 554).

Having in mind the provision of the statutes relative to imposing the tax adverted to above and the broad grant of authority under Section 206.110, this office concludes that the legislature intended to grant to a hospital district the authority, when duly constituted, to impose taxes so that the board can effectuate the powers set out in Section 206.110, supra. To "establish" and "to acquire land" (under Section 206.110) for the hospital necessarily implies the authority to buy land before the hospital can be built thereon. If authority is granted to buy land, it must necessarily follow that the district accumulate the money to pay for the land and to do those preliminary things necessary to build the hospital. We therefore conclude that the power to tax exists in the district before a hospital is actually constructed and operated.

Land for the hospital site is by definition included in

Honorable William Baxter Waters

subsection (2) of Section 206.110, supra,. You refer in your amending letter to Section 206.120, which you feel might imply that bonds must be voted for the purpose of purchasing sites and erecting buildings. The section provides in part that "the Board of Directors may borrow money and issue bonds", etc.

As we read the statute, this may be considered one way for the district to raise the money to build the hospital. For example, another way of securing money to build the hospital might be by gift. It appears to us, therefore, that when the money is not acquired under the provisions of Section 206.120, that the limitations (implied under that section) cannot be applied to moneys accumulated by other means.

A further comment in this area may be appropriate. It is, that although the hospital board is authorized to construct a hospital etc., this grant of power is limited by the provisions of Article VI, Section 26(a) of the Missouri Constitution, 1945, which, in substance, prohibits the board from incurring any indebtedness in any year exceeding the income and revenue provided for such year plus the unencumbered balance of any previous years (except by a two-thirds vote of the qualified electors of such district authorizing the incurring of an indebtedness).

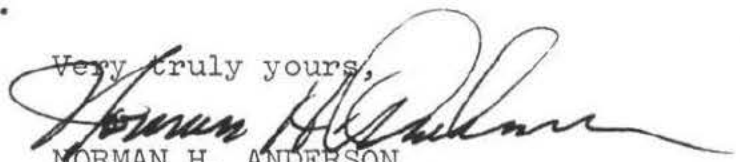
The second question cannot be answered inasmuch as the question is so broad as to encompass tax money to "be used for any of the purposes enumerated in Section 206.110, RSMo., Cum. Supp. 1963". Any attempt to generalize on disbursements "for any of the purposes enumerated in Section 206.110" (supra) is not feasible except when based on specific facts. If a question on a specific disbursement arises, then it is suggested you submit that question for solution.

#### CONCLUSION

It is the opinion of this office that a hospital district board duly organized under Chapter 206, Cum. Supp. RSMo., 1963, has the authority to levy a tax before a district hospital is actually constructed and operating.

The above opinion, which I hereby approve, was prepared by my assistant, Richard C. Ashby.

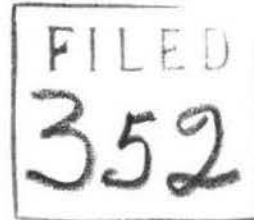
Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

November 23, 1965

Opinion No. 352  
Answered By Letter  
(Mansur)

Honorable Frank C. Mazzuca  
Representative, 1st District  
Jackson County  
1700 Wyoming  
Kansas City, Missouri 64102



Dear Mr. Mazzuca:

In your letter of September 8, 1965, you request an opinion from this office concerning the validity of House Bill No. 386, enacted by the 73rd General Assembly.

Your first question is whether House Bill No. 386, will allow the sale and use of voting machines which lists the names of the candidates for public office in a horizontal manner.

House Bill No. 386, repealed and reenacted certain statutory provisions concerning voting machines including Sections 121.100 and 121.060 RSMo.

Section 121.100, subdivision 4, V.A.M.S. 1959, reads as follows:

"4. The order of the arrangement of parties and candidates shall be as provided by law not in conflict herewith except that the candidates for nomination for any one office at any primary election shall be listed in the order of filing, and the order of the arrangement of the parties on the state and county primary elections shall be as provided by law for general elections."

Honorable Frank C. Mazzuca

This provision of the statute was considered by the Supreme Court of Missouri in *City of St. Louis v. Crow*, 376 S.W. 2d 185 (1964). The Court held that under the above provision of the statute the names of candidates for nomination to various offices should be listed in the order of filing in a single vertical column opposite the name of the office for which they are a candidate. This statute was repealed by House Bill No. 386 and reenacted so that it now reads, subdivision 4:

"The order of the arrangement of parties and candidates shall be as provided by law, not in conflict herewith, except that the candidates for nomination for any one office at any primary election shall be listed in the order of filing, either vertically or horizontally. If the candidates are listed vertically, all names of candidates for the same office shall appear in the same vertical column. If the candidates are listed horizontally, the order of listing shall be from left to right, and if the first horizontal row is filled and two or more rows are needed to list candidates for an office, the remaining candidates shall be listed in the order in which they filed, from left to right, in the second and any additional horizontal row needed to list all candidates for the office, and the order of the arrangement of the parties on the state and county primary elections shall be as provided by law for general elections."

The basic rule of statutory construction is to seek the intention of the lawmakers and, if possible, effectuate that intention; and the court should ascertain legislative intent from the words used, if possible, and should ascribe to the language its plain and rational meaning. *State ex rel Wright v. Carter*, 319 S.W. 2d 596. The legislature is presumed to be aware of interpretations placed upon the existing statute by the state appellate courts, and it is presumed that in amending a statute or enacting a new statute, the legislature's intent is to effect some change in the existing statute. *Wright v. J. A. Tobin*

Honorable Frank C. Mazzuca

Construction Company, 365 S.W. 2d 742; Darrah v. Foster, 355 S.W. 2d 24.

Section 121.100, as amended by House Bill 386, expressly provides that the names of the candidates for office shall be listed in the order of filing, either horizontally or vertically, and expressly the manner in which they are to be so listed. This statutory provision does not appear to be ambiguous and no factual situation has been presented that gives rise to any ambiguity.

In your second question inquiry is made whether the bill will allow the use of an adapter. We are informed the "adapter" inquired about is the device for printing, embossing, or photographing the recording counters which show the total number of votes cast as provided under Section 121.060, subsection 14, as amended by House Bill 386.

House Bill 386 provides in part that any type of voting machine shall be approved which is so constructed as to fulfill certain requirements, including the following:

"(14) It may be provided with a device for printing, embossing or photographing the recording counters before the polls open and after the polls close, making the opening of the counter compartment by the election officials unnecessary. Recording counters are the counters which show the total number of votes cast for any one candidate at any particular time."

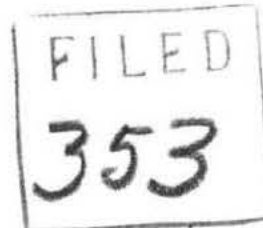
This provision of House Bill No. 386, does not appear to be ambiguous and no facts have been submitted to give rise to any ambiguity. There is a legal presumption that a statute is valid; if there is doubt as to the constitutionality of the statute, the doubt should be resolved in favor of the validity of the act; that the expediency or in expediency of the act is not for the courts; that the power of the legislature to enact laws has no limitation except that expressed in the state and federal constitution. State ex inf. Barker v. Merchants' Exchange, 269 Mo. 346.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



Opinion No. 353  
Answered by Letter Richard C. Ashby



Nov. 24, 1965

Honorable James L. Paul  
Prosecuting Attorney  
McDonald County  
Pineville, Missouri 64856

Dear Mr. Paul:

This letter is given in response to your question on the authority of the county court or special road district to maintain the ditches, cut brush along side a public road, and to do similar work on the land contiguous to such road where the roadway had been established by prescription.

In discussing the facts over the telephone with a member of this office, you cite a case where the specific facts involved were as follows:

At an intersection involving roadways established by prescription, the road gang had cut back the brush from the traveled roadway from 12 to 15 feet and graded down a corner at the intersection. This was done as a safety measure to allow people using the road to obtain thereby a wider angle of vision while approaching the corner. In this case, they cut down an 8 inch oak. No fences were involved. Consent of the owner had not been obtained prior to the action by the road gang.

You asked that we comment on this situation when we respond to your letter.

The general rule on the extent of a highway (width and length) acquired by prescription is stated in 39 C.J.S., Highways, Section 20, at page 938. It reads as follows:

Honorable James L. Paul

"Width and extent generally. Generally speaking, the width and extent of a highway established by prescription or user are governed, measured, and limited by the extent of the actual user for road purposes. The easement is not, however, necessarily limited to the beaten path or traveled track, or to such path and the ditches on either side, but carries with it the usual width of highways in the locality, or such width as is reasonably necessary for the safety and convenience of the traveling public, and for ordinary repairs and improvements. In other words, a highway established by user or prescription includes the traveled track and whatever land is necessarily used as incidental thereto for highway purposes; but this does not mean that the prescriptive right carries with it a right in the public to lay out and construct an extended and enlarged highway.

"The question of the width of a highway by user is affected in some states by statutes prescribing the width of highways generally. Such a statute does not govern the width absolutely; a prescriptive highway may be either broader or narrower than the width prescribed for highways generally.

"An important element in determining the width of a highway by prescription is the recognition of the limits of the way by persons whose lands front thereon, as indicated by the monuments and fences which they themselves place upon the ground, and the lines which they fix for the same in making conveyances of their property."

In Missouri, the courts seem to apply a more restrictive interpretation than that set out in C.J.S. The principle announced by the courts is that the only right that the public has in a highway, as a result of adverse user for the statutory period, is limited to the traveled or used portion of the road.

See the following cases: City of Higginsville ex rel and to Use of Kasco, Inc., v. Alton R Co., 171 S.W. 2d 795, 805; Roth v. Hoffman et al, 111 S.W. 2d 988, 992; Eckerle v. Perry, 297 S.W. 424, 425, and California Special Road Dist. v. Bueker, 256 S.W. 98.

Honorable James L. Paul

Thus, on the limited question based on the facts recited above, the road gang (in cutting down the brush and grading off that portion or area of land at the corner which was not part of the traveled or used portion of the road) exceeded their authority.

The term "used portion of the highway" is not limited to the narrow traveled tracks made by the vehicles but to the full extent of any user which the public, etc., (as a question of fact) may have exercised such as ditching, maintenance, etc., (State v. Auffart, 180 S.W. 571, 572).

Concerning the broader question posed by your letter, it is possible for the land owner of contiguous land to a public road to dedicate additional land for public use either by actual dedication in fact or by an implied dedication or estoppel in pais. The court in State ex rel McIntosh v. Haworth, 124 S.W. 2d 653, 1.c. 656, had this to say:

"[4,5] Respondent contends that notwithstanding the provisions of the laws of 1887, page 257, section 57, the highway in question became a public highway by implied dedication or estoppel in pais. While it has been held that regardless of the Laws of 1887, page 257, section 57, that the public may thus acquire the right to use a road as a public highway even though it not be opened by order of the county court and though no public money or labor has been expended thereon (Mayo v. Schumer, Mo. App., 256 S.W. 549, Borchers v. Brewer, 271 Mo. 137, 196 S.W. 10; Walker v. Southwest Missouri R. Co., Mo. App., 198 S.W. 441; School Dist. No. 84 et al v. Tooloose, Mo. Sup., 195 S.W. 1023), yet mere user in and of itself alone is not sufficient to establish a public highway by dedication or estoppel. Our Supreme Court in Borchers v. Brewer, 271 Mo. 137, loc. cit. 142, 143, 196 S.W. 10, 12, quoting from Elliott, Roads and Streets, gives the following rule to be applied in such cases: 'An implied dedication is one arising by operation of law from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is not founded on a grant, nor does

Honorable James L. Paul

it necessarily presuppose one, but it is founded on the doctrine of equitable estoppel. \* \* \* It is essential that the donor should intend to set the land apart for the benefit of the public; for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.'

"[6] The sole test in determining whether or not there has been a dedication, is the intent on the part of the owner of the land to dedicate the same to public use as a highway. This intent can be either express or implied but if the intent to dedicate is absent there can be no valid dedication."

See also the cases of *Borders v. Glenn*, 232 S.W. 1062, 1064; *City of Caruthersville v. Cantrell et al*, 230 S.W. 2d 160, 166.

We conclude that such work can be done on private land only if the consent of the owner (either express or implied) is obtained and only then, if it is in the public interest.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Opinion No. 355  
Answered by Letter  
(Nowotny)

November 9, 1965



Mr. Eugene P. Walsh  
Legal Assistant to the Governor  
Executive Office  
Jefferson City, Missouri

Dear Mr. Walsh:

This is in answer to your letter concerning a Mrs. Alta McGraw who fell on the premises of the Missouri School for the Blind.

The Missouri School for the Blind is now provided for by Sections 178.010 to 178.150, V.A.M.S., and the school is put under control of the State Board of Education. Therefore the Missouri School for the Blind is a part of the state.

The court in *Bush v. State Highway Commission of Missouri*, 329 Mo. 843, 46 S.W. 2d 854, said this, l.c. 857:

"[1] The proposition that the state is not subject to tort liability without its consent is too familiar to deserve extended citations of authorities."

Enclosed is a copy of Attorney General Opinion, dated September 8, 1934, to the Honorable Harve G. Gray, adhering to this doctrine of sovereign immunity from tort liability.

Therefore, in the absence of an express statute permitting recovery from the state Mrs. McGraw cannot recover. Our research has failed to find such a statute.

Also attached are copies of Attorney General Opinion, dated June 18, 1951, to the Honorable Charles A. Witte, and Attorney General Opinion, dated March 30, 1965, to the Honorable Jack Keane, which hold that Mrs. McGraw cannot be compensated through either a special relief bill or legislative appropriation.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General



September 22, 1965

Mrs. Olean Barton, Acting Secretary  
State Board of Registration for  
Architects and Professional Engineers  
Box 184  
Jefferson City, Missouri 65102

Dear Mrs. Barton:

This is in answer to your request for an opinion of this office concerning the validity of the following proposed regulation concerning the registration of land surveyors:

"Regulation 1-8-65-1s. Registration as a land surveyor on basis of degree in civil engineering, written examination and proof of at least two years of satisfactory land surveying experience. Any person applying for registration as a land surveyor solely on the basis of a degree from a fully accredited four-year course in civil engineering from a school or college of engineering approved by the Board, who is found qualified in all other respects and who passes a one-day written examination in land surveying, will also be required to submit proof of at least two years of land surveying experience of a character satisfactory to the land surveying section of the board, before registration will be granted."

Assuming the professional engineering division of the board has authority either implied or expressed under Section 327.108-2 to issue regulations, it is our opinion that the proposed regulation in question would not be valid.

The profession of land surveying is regulated by Chapter 344 RSMo. Section 344.040 sets out the requirements for registration as established by the legislature as follows:

Mrs. Olean Barton

"Any person who shall show to the satisfaction of the professional engineering division of the state board of registration for architects and professional engineers that he is a person of good moral character, over the age of twenty-one years, with six years or more of active experience in land surveying of a character satisfactory to said division, or possessed of a degree in civil engineering from an accredited college or university, and who shall pass a written examination designed to show that he is qualified to practice land surveying, shall be eligible for registration as a land surveyor, and shall be so registered by the board on recommendation of its professional engineering division. In determining the land surveying experience of an applicant for registration, \* \* \*" (Emphasis ours.)

It should be noted that anyone who possesses these qualifications shall be eligible for registration and shall be so registered.

The proposed regulation would make two years experience as a land surveyor an additional requirement for those persons possessed of a degree in civil engineering in order to qualify as a land surveyor.

In 73 C.J.S., Public Administration Bodies and Procedure, Section 94, p. 415, which is concerned with statutory limitations of an administrative body to make rules and regulations, it is stated:

"It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment."

This is the law in this state. See Ketring v. Sturges, 372 SW 2d 104; Mahon v. Searce, 228 SW 2d 384 and State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission, 225 SW 2d 792.

Mrs. Olean Barton

The proposed regulation does not "implement or make specific" the requirements of Section 344.040. It enlarges the statute by imposing an additional requirement, i.e., that one having a degree in civil engineering must also have at least two years of satisfactory surveying experience.

We think this regulation is contrary to the express requirements of the legislature and therefore invalid as beyond the power of the board.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

OPINION NO. 358  
Answered by Letter  
(Randolph)

September 22, 1965

Honorable Robert B. Paden  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri

Dear Mr. Paden:

This letter is in response to your request for an opinion of this office on the question whether a public administrator of a third class county can hold that office as well as being elected alderman of a fourth class city.

We enclose a copy of the opinion of the Attorney General to Honorable Charles G. Hyler, dated December 11, 1964, holding that a person may hold the office of Public Administrator and be a member of the County School Board at the same time.

In the light of the Hyler opinion, a person could be public administrator of a third class county and an alderman of a fourth class city simultaneously, unless the two offices are incompatible; that is, unless the duties of the two offices are inconsistent, antagonistic, repugnant, or conflicting, as where, for example, one office is subordinate to the other.

The office of public administrator concerns itself with the handling of estates and guardianships and is limited almost without exception to probate matters, whereas an alderman is a municipal legislator, whose affairs as alderman are not related to estates and guardianships.

Seeing no incompatibility between the two offices, it is the opinion of this office that one person may simultaneously hold the office of public administrator of a third class county and the office of alderman of a fourth class city.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

Encl  
DLR/sj

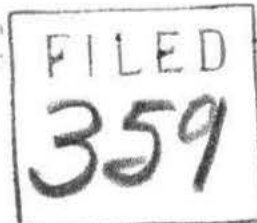
RIVER BEDS:  
COUNTY LANDS:

Abandoned river bed lands belonging to a county of this state may be sold at public or private sale and without a survey.

September 22, 1965

OPINION NO. 359

Honorable John B. Mitchell ✓  
Prosecuting Attorney  
Buchanan County Court House  
St. Joseph, Missouri



Dear Mr. Mitchell:

You make the following inquiry to this office:

"May the County Court sell abandoned river bed land at a private sale without a survey?"

Chapter 241, RSMo 1959, controls here.

Concerning sale of the land without a survey, we regard the case of *Sexton v. Dunklin County*, 296 Mo. 682, 246 S.W. 195, as being completely dispositive. There it was stated "... we find no legislative enactment requiring a survey of [such] lands to be made prior to the power of the county to convey title thereto." Although that decision of the Supreme Court of Missouri was rendered in 1922, there is still no statutory requirement that a survey be made prior to sale of abandoned river bed lands. See *Hamburg Realty v. Woods*, 327 S.W. 2d 138.

With respect to sale of the lands at private vendue, two statutory provisions control and require some explanation.

In 1850, Congress granted all of the river beds, islands, overflow and swamp lands to the states (Title 43, § 982, United States Code). In the laws of 1851, our Legislature, in turn, granted the swamp and overflow lands to the counties and provided that they could be sold for the benefit of the schools.

The manner of conducting the sale of those lands was set out in what has come to be Section 241.160, RSMo 1959, which provided that they could be sold either



Honorable John B. Mitchell

at public auction after certain notice or, if deemed advisable in the judgment of the county court, at private sale.

The provisions for the sale of emerging islands and abandoned river beds did not come into our laws until 1895, at which time the Legislature, in what is now Section 241.310, RSMo 1959, provided that such lands could be sold ". . . in the same manner that [sic] the swamp lands acquired under the act of Congress of September 28, 1850 . . . ."


Thus, there appears to be no question that the Legislature contemplated authorizing the sale of such lands at either public auction or private treaty.

#### CONCLUSION

Abandoned river bed lands belonging to a county of this state may be sold at public or private sale and without a survey.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Howard L. McFadden.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

CONSTITUTIONAL LAW: Legislature at a special session can act  
GOVERNOR: only upon subject within scope of Governor's  
EXTRAORDINARY SESSION: proclamation.  
LEGISLATURE:  
GENERAL ASSEMBLY:  
REAPPORTIONMENT:

Opinion No. 360

October 20, 1965

Honorable Mel Carnahan  
Majority Floor Leader  
Missouri House of Representatives  
Third and Rolla Streets  
Rolla, Missouri

Honorable Ronald M. Belt  
Minority Floor Leader  
Missouri House of Representatives  
1015 North Jackson  
Macon, Missouri



Dear Sirs:

This is in answer to your letter of recent date in which you submit the following opinion request:

"If and when the subject of reapportionment of the Missouri House of Representatives is submitted by the Governor to the General Assembly, is the General Assembly required to follow the views of the Governor as contained in the call, or is the General Assembly authorized to legislate upon the matter or subject in any way that it sees fit?"

The Governor under date of October 8, 1965, issued his proclamation convening an extraordinary session of the General Assembly of Missouri for October 18, 1965. The first three paragraphs of such proclamation relate to apportionment of the State Legislature and provide as follows:

"Paragraph One. To adopt a joint resolution submitting to the qualified voters of this State, for adoption or rejection, an amendment to the present Constitution of Missouri, fixing the number of the Senate and the House of Representatives of the General Assembly and providing the method and times for reapportionment of the Senate and House of Representatives by separate bi-partisan commissions in a manner that will comply with recent decisions of the

Honorable Mel Carnahan  
Honorable Ronald M. Belt

United States Supreme Court interpretive of the Constitution of the United States as related to apportionment of the state legislatures.

"Paragraph Two. Enactment of legislation that would repeal those sections of Chapter 22, RSMo., 1959, relating to apportionment in multi-district counties and the City of St. Louis, and that section of said chapter fixing the number of the House of Representatives in accordance with the present provisions of Section 9 of Article III of the Constitution, which I believe to be constitutionally invalid because of the 'one man-one vote' decision of the Federal Court decision regarding apportionment of state legislatures.

"Paragraph Three. Enactment of legislation that would provide that a candidate for election to the House of Representatives of Missouri file his declaration of candidacy in the office of the Secretary of State and that his fee for filing be paid to the Treasurer of the State Central Committee of his party."

Section 9, Article IV of the Constitution of Missouri provides:

"The governor shall, at the commencement of each session of the general assembly, at the close of his term of office, and at such other times as he may deem necessary, give to the general assembly information as to the state of the government, and shall recommend to its consideration such measures as he shall deem necessary and expedient. On extraordinary occasions he may convene the general assembly by proclamation, wherein he shall state specifically each matter on which action is deemed necessary."

Article V Section 9 of the Constitution of 1875 respecting Special Sessions is identical. Section 39 (7) of Article III of the Constitution of Missouri provides:

"The general assembly shall not have power 'To act, when convened in extra session by the governor, upon subjects other than those specially designated in the proclamation calling said session or recommended

Honorable Mel Carnahan  
Honorable Ronald M. Belt

by special message to the general assembly after the convening of an extra session.'"

Article IV Section 55 Constitution of 1875 is almost identical except the wording has been somewhat rearranged but not materially so.

The general rule regarding the power of the General Assembly to enact legislation at an extraordinary session is found in Paragraph 10 (b), 82 C.J.S., Page 27, which provides in part, as follows:

"Under constitutional provisions limiting legislation at special or extra sessions, the call or proclamation may contain many or few subjects according to the governor's conception of the public need, and, within his discretion, he may confine legislation to the subjects specified, which may be done by his proclamation alone, or by special message after the legislature has convened on call, or by both. The governor may limit the consideration of a general subject to a specified phase of it, but he cannot restrict the details springing from such subject, and his authority over the legislature is limited to his recommendation. The governor may make suggestions with respect to the disposition of the subject matter of the proclamation or call, but suggestions are merely advisory and not binding, and specific instructions on the subject matter of the call can, at best, be regarded only as advisory and not as limiting the character of the legislation that might be had on the general subject. Thus, where a general object is described, the legislature is free to determine in what manner such object shall be carried into effect, since, while the legislature must confine itself to matters submitted, it need not follow the views of the governor or legislate in any particular way, but may act freely and legislate on all or any of the subjects specified or on any part of a subject, provided a new subject unrelated to those stated is not acted on."

Honorable Mel Carnahan  
Honorable Ronald M. Belt

Unquestionably the General Assembly cannot act on a subject not included in the Governor's proclamation or in a message from the Governor. In the case of *Smith v. Curran*, 268 Michigan 366, 256 N.W. 453, a leading case on the subject, the Supreme Court of Michigan held invalid an act passed at a special session of the legislature providing for validation of bonds that had been issued without a vote by the people or without authority of law by city councils when the subject of the Governor's proclamation was the validation of bonds issued under authority of law, but issued irregularly.

In *Sims v. Weldon*, 165 Arkansas 13, 263 S.W.2d 42, the Supreme Court of Arkansas held invalid a statute passed at a special session of the legislature which levied a sales tax on cigars and cigarettes when the proclamation of the Governor called for enactment of an income tax statute.

In *State v. Woolen*, 128 Tennessee 456, American Cases 1915C465, 161 S.W. 1006, the Supreme Court of Tennessee held invalid an appropriation for the "National Exposition Company" a private corporation when the proclamation of the Governor provided for appropriations for state institutions, offices and departments.

In *State v. Adams*, 323 Missouri 729, 19 S.W.2d 671, the Missouri Supreme Court held that the legislature was without authority to enact a provision at a special session providing that "the jury shall decide which punishment shall be inflicted," when the Governor's message authorized the legislature to consider the repeal of the statute abolishing capital punishment and reenactment of such a statute in lieu thereof.

In *State ex rel. Rice v. Edwards*, 241 S.W. 945, decided by the Missouri Supreme Court, the Governor's message authorized the division of cities over 600,000 into justice of the peace districts. The court held invalid an act relating to justice of the peace districts and constable districts because the subject of constable districts was not included in the Governor's message. This case was overruled by *State v. Adams*, supra, only insofar as this case held the entire act providing for justice of the peace districts and constable districts to be unconstitutional but was not overruled as to its holding that the legislature has no authority to act on a subject not included within the Governor's proclamation or in a message by the Governor.

In *State ex rel. Carpenter v. City of St. Louis*, 318 Missouri 870, 2 S.W. 2d 713, an act at a special session of the legislature



Honorable Mel Carnahan  
Honorable Ronald M. Belt

was held invalid by the Supreme Court of Missouri because such act related to libraries but the Governor's proclamation related to roads and road bonds.

In *Schlaflly v. Baumann*, 108 S.W. 2d 363, decided by the Supreme Court of Missouri, the Governor's proclamation authorized the legislature at a special session to repeal a section relating to limitation of actions concerning back taxes and repeal of a section providing a limitation period for sale of property for back taxes. The Court held a provision enacted at such special session would be invalid if it attempted or purported to change the date of sale of real property for delinquent taxes.

In *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 15 L.R.A. 47, 19 S.W. 530, the Supreme Court held mandatory the provisions of the constitution providing that matters acted on by the legislature at an extraordinary session must be included in the proclamation of the Governor or in a message by the Governor. The court held that the proclamation therein involved authorized action only relating to railroad rates and held unconstitutional and invalid legislation providing for safety measures relating to railroad switches enacted for the prevention of accidents.

It is also clear that the Governor has power only to state in a proclamation or message the subject of legislation and cannot restrict the legislative authority to act in any way the legislature sees fit in relation to such subject. Any attempted restriction by the Governor in his proclamation or message limiting the power of the legislature to act in a particular way on the subject of the proclamation or message is ineffective and at most is advisory only.

In *Timmer v. Talbot*, 13 F. Supp. 666, a Federal District Court in Michigan held that a statute enacted at a special session of the legislature was valid which statute related to chattel mortgages generally, even though the Governor's proclamation provided only for legislation relating to installment mortgages on livestock and farm products. The court said l.c. 668:

"Hence the primary consideration is: What was the subject submitted in the Governor's message? A narrow view would be that the only subject so submitted was that of installment mortgages on livestock and farm produce, that the problem to be solved was that of federal loan agencies in their determination of the amount of liens, and that the only permissible solution was to provide

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for the filing of chattel mortgages with the register of deeds instead of with township clerks.

"[1] The reasonable deduction from the authorities, however, is that while the Governor may control the subject-matter of legislation to be enacted at a special session, he may not restrict boundaries within the natural range of that subject or dictate methods of dealing with it, or limit the class of those to be benefited."

In the case of *In re Opinions of the Justices*, 233 Ala. 185, 171 So. 902, the Supreme Court of Alabama held that the Governor's proclamation calling a special session of the legislature cannot restrict the discretion of the legislature as to the particular manner in which the legislature is to act concerning the subject set out in the proclamation. In that case the Governor's proclamation was in part as follows:

"'6. To regulate the manufacture and sale of spirituous, vinous or malt beverages through State owned and operated stores or other State supervision, and to provide for a referendum thereon to the electors of Alabama.'"

The court held a proposed act would be valid such act providing for state liquor stores without providing for a referendum thereon. The court said So., 1.c. 903:

"We are of opinion the subject here designated is the regulation of the manufacture and sale of spirituous, vinous, or malt beverages in this state.

"The matter of a referendum, vel non, is within this subject, and a matter for the determination of the Legislature. The reference to a referendum in the proclamation is to be treated as advisory merely."

In *Ex parte Fulton*, 86 Cr. 149, 215 S.W. 331, the Court of Criminal Appeals of Texas held valid a local option law making it unlawful "to have or keep" intoxicating liquor for personal use in a public road or other public place. The court said S.W., 1.c. 334:

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"In his proclamation calling the special session, the Governor called on the Legislature to pass a law prohibiting the sale of intoxicating liquors within ten miles of any army camp; also to prohibit sale or gift to soldiers throughout the state. Elaborating his objects in subsequent communications, the Governor attached correspondence between himself and the Secretary of War, in which it is made plain that the design was to prevent intoxicants reaching the soldiers who were training at various localities in the state, and the means suggested was to designate zones in which such liquors 'shall not be allowed.'

"[4,5] We are of the opinion that the Governor, in his proclamation and messages submitted to the Legislature the subject of legislation to restrict the liquor traffic and render such liquor inaccessible to the soldiers. It is not contemplated that the Governor shall state the details of legislation in order to give the Legislature jurisdiction to consider it at a special session. Brown v. State, 32 Tex. Cr. R. 132, 22 S.W. 596. He must submit the subjects, but the methods are within the discretion of the Legislature. Long v. State, 58 Tex. Cr. R. 209, 127 S.W. 208, 21 Ann. Cas. 405.  
\* \* \*

In State Tax Commission v. Preece, 1 U. 2d 337, 266 P. 2d 757, the Supreme Court of Utah upheld the validity of an increased tax on cigarettes imposed at a special session of the legislature. The Governor's proclamation was on the subject of school retirement, finance and taxation and recommended that the necessary moneys for school purposes be raised by borrowing from certain funds and an increase of taxes on local property. The court said, P. 2d 1.c. 760:

"It seems clear that the Governor's objective was to avoid the imposition of any new state tax and to see that the added expense of the new program was supported from other sources, primarily by the local districts, as these comments show: 'There are certain requisites to a changed financing law that will be met in my proposal including better equalization among the districts and greater local responsibility and control. It is essential that we

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increase local board responsibilities \* \* \* ,  
if we are ever to bring taxing and spending  
into line. Those who decide on expenditure  
policies should bear the political respon-  
sibility for raising the necessary funds."

The court said further, l.c. 761:

"We believe that the message here was of suf-  
ficient breadth that it presented the problem  
of school financing and the providing of funds  
therefor. Normally it is both the duty and re-  
sponsibility of the Legislature to determine  
how this shall be done. We are then confronted  
with the question whether the Governor can call  
a Special Session to deal with the subject of  
financing our public schools, and by limiting  
the agenda to definite proposals as to how it  
shall be handled, formulate the policy with  
respect thereto. The answer to this proposi-  
tion is found in the quite universally accepted  
rule, hereinbefore stated, which we approve:  
That while the Governor may limit the legislative  
agenda as to the purpose or subject matter to  
be considered, he cannot restrict it as to the  
means it pursues in solving a problem presented  
as a subject for legislative action. It is true,  
of course, that the Governor may make such recom-  
mendations as he sees fit, but these are not  
binding on the Legislature; they may exercise  
their discretion in following the recommendations  
or seek alternative methods in dealing with the  
'subject' presented."

In *Commonwealth v. Liveright*, 308 Pennsylvania 35, 161 A.  
699, the Supreme Court of Pennsylvania upheld the validity of an  
act providing for an appropriation to the Department of Welfare for  
payment to local political subdivisions for relief of the poor  
under a proclamation for the special session of the legislature  
at which such law was enacted calling for an enactment of laws  
to relieve unemployment, the court holding that employment relief  
means poor relief. The court said, A., l.c. 704:

"*State v. Woolen*, 128 Tenn. 456, 161 S.W.  
1006, see note 2 below, an authority stressed  
by both sides, best sums up the general rules,  
stating: 'All [the cases] provide that the  
Governor may confine the Legislature, called



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in a special session to such subjects of legislation as he may prescribe, which limitations he may make operative \* \* \* All the cases agree that, while the Governor may so limit the subjects of legislation, he cannot dictate to the Legislature the special legislation they shall enact on those subjects. In all of them the inquiry is finally reduced to the ascertainment of the subject or subjects embraced in the call \* \* \* determined by an analysis and construction of that paper as in the case of any other written instrument, and by a like analysis and construction of the legislation drawn in question for the purpose of deciding whether it is embraced within the call, or message.'

\* \* \* \* \*

"The Governor having designated a channel of legislation through the subjects submitted to the Legislature, that body need not, in keeping within these subjects, be bound in the manner, method, or means of accomplishment as stated or implied in them (Likins' Petition, supra), but may, within a prescribed subject, add thereto, or modify or enlarge it, so that, not losing its intimate relation with the subject designated, it may accomplish the purpose set forth in the particularization of the general subject designated in the call. State v. Pugh, 31 Ariz. 317, 252 P. 1018."

In the case of In re Likins, 223 Pa. 456, 72 A. 858, the Supreme Court of Pennsylvania upheld the validity of a provision enacted at a special session providing for audit of accounts of expenses of candidates for office when a petition requesting such audit was filed. The proclamation of the governor in such case was for legislation regarding the use of moneys by candidates and for filing statements of expenditures by such candidates. The court said, A., l.c. 861:

"\* \* \* No one could read either the proclamation of the Governor or the title of the act without meeting the subject referred to in both--the use of money in elections--and, as we said in Commonwealth v. Jones, 4 Pa. Super. Ct. 362: "The subject may have but one object, while the means necessary for the attainment of that object may necessarily embrace separate subjects differing in their



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nature and particular effect, yet all contributing to it and comprised within the principal subject. Everything which the language of the subject of a title reasonably suggests as necessary or appropriate for the accomplishment of its express purpose is sufficiently enacted by its title"--and either the proclamation or the title is sufficiently clear and explicit to invite an inquiry into the body of the bill. Nor is the requirement of the law satisfied by anything short of an examination of the whole body of the act when an inquiry is once invited by a sufficient title, and the same reasonable rule applies to the sufficiency of the proclamation. \* \*

\*1"

In the case of State Note Board v. State, 186 Ark. 605, 54 S.W. 2d, 696, the Supreme Court of Arkansas held valid a statute enacted at a special session of the legislature which authorized the issuance of short term notes by the State Note Board even though the proclamation of the governor authorized legislation only for the issuance of revenue bonds. The court said, l.c. 698:

"As has been observed, the purposes, as indicated in the proclamation, for the calling of said extraordinary session of the General Assembly, were for the three reasons above set forth. The use of the language authorizing the Legislature to issue revenue bonds was merely a suggestion as to how to dispose of the subject-matter designated in the call, and, while the Governor may make such suggestions, such suggestions or directions are not binding on the Legislature or restrictive of the legislative power, and the action of the Governor in prescribing in his call the character of bonds to be issued to bring about the necessary legislation is treated as being merely advisory. 25 R. C. L. 805.

"It was never contemplated by the Constitution that the Governor should restrict the Legislature as to details, methods, or manner in bringing about the end sought. Ex parte Fulton, 86 Tex. Cr. R. 149, 215 S. W. 331.

"Specific instructions on the subject-matter in the call can, at best, be regarded only as advisory and not as limiting the character of legislation that might be had upon the general subject. People v. District Court, 23 Colo. 150, 46 P. 681"

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In the case of State Road Commission of West Virginia v. West Virginia Bridge Commission, 112 W. Va. 514, 166 S. E. 11, the Supreme Court of Appeals of West Virginia said, S. E. 1.c. 13:

"\* \* \* But the purpose of the proclamation in counseling both the revision of salaries and the passage of a revenue measure was mainly to secure a balance of the budget. That balance was an important end to be achieved, and the revision of salaries and the revenue measure were but suggested means to that end. It is therefore apparent that balancing the budget was in fact a business stated in the proclamation. True it is, that his Excellency contemplated effecting such balance only through the reduction of salaries and the revenue measure. But it is settled law that the contemplation or recommendation of a Governor is 'regarded as advisory only,' which the Legislature may accept or reject at its discretion. People ex rel. v. District Court of Arapahoe County, 23 Colo. 150, 46 P. 681. In authorizing a Governor to state the business of an extraordinary session, and in limiting legislative action to that specific business, the Constitution does not confer on him one jot of legislative power. The Constitution vests that power exclusively in the Senate and House of Delegates, whether the session be regular or extraordinary."

The doctrine that the legislature is authorized to legislate upon the subject of the governor's proclamation or message in any way it sees fit was succinctly stated by the Supreme Court of Missouri in the case of State ex rel. Rice v. Edwards, supra, in which case the court said, 1.c. 948:

"In discussion of the question as to whether or not the General Assembly remained within the limits of the matter or subject submitted to it for legislative action by the message of the Governor, we want to first say that we find no fault with those cases which hold that when the subject or matter is submitted to the Legislature, the Legislature is authorized to legislate upon the subject or matter in any way that it sees fit. It does not have to follow the views of the Governor, and legislate in a particular way upon the submitted subject. But this rule does not change the rule that the Governor can limit the subject-matter for consideration, and for legislative action. The matter to be legislated upon at a special session is within the discretion of

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the Governor. If he wants legislation upon certain matters pertaining to railroads, or their employees, he must specifically designate it and when he has specifically designated it, the law-makers are not permitted to ramble through the whole domain of corporation law. Their legislation must be within the narrow bounds of the subject or matter submitted. *Wells v. Ry. Co., supra.*"

In *Ex parte Seward*, 299 Mo. 385, 31 A.L.R. 665, 253 S.W. 356, the Supreme Court of Missouri, en banc in discussing the provisions now contained in Section 39 (7) of Article III of the Constitution of Missouri, S.W., l.c. 357:

"It is true that section 55 of article 4 is a limitation upon the powers of the General Assembly in extra session and is mandatory. *Wells v. Railway*, 110 Mo. loc. cit. 296, 297, 19 S.W. 530, 15 L.R.A. 847. What it commands, however, depends upon what it means. The power it denies is the power to act upon any subject, unless that subject is designated in the convening proclamation or 'recommended by special message to its consideration,' etc. There is no implication that it is necessary for the Governor to favor one sort of act rather than another with respect to a subject he 'recommends' by special message.

"The General Assembly does not have to legislate upon the special matter just as the Governor may desire, or as he might indicate in an ill-advised message, but such body must confine itself to the matter submitted by the Governor. It cannot go beyond the matter submitted.' *State ex rel. Rice v. Edwards* (Mo. Sup.) 241 S. W., loc. cit. 948.

"The effect of this is to say that whatever action upon the subject the Governor may favor, the sole effect of his recommendation or submission is to bring that subject within the legislative power as a subject of legislation. This is the clear meaning of the section, since it is the 'subject' alone which is required to be 'recommended' before action be taken upon it. \* \* \*"

Examination of these cases establish certain principles:

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The Missouri cases make clear that if legislation is enacted at a special session that is outside the "subject" of the Governor's call or proclamation or message it is void.

The Missouri cases make clear that the Governor must specifically designate in his call or proclamation for a special session the "subject" or "matter" that is to be considered by the legislature.

That the Governor may in his recommendations spell out in detail his ideas and proposals for consideration by the legislature although the legislature is not bound by the specific detail so spelled out by the Governor.

The Missouri cases have not made clear the line of demarcation in the Governor's call or proclamation between a call which is too specific and a call which is too general. We do have some aid in the resolution of this problem by the cases in other states.

The crux of the problem then seems to be what is the "matter on which action is deemed necessary" (Art. IV, Sec. 9 Constitution) or what are the "subjects" designated in the proclamation. (Art. III Sec. 39 (7) Constitution). We believe that "matter" and "subjects" as used in these two provisions of the Constitution are synonymous. It does not seem possible to define these terms satisfactorily or to explain their meaning except when applied to particular fact situations. We therefore deal with the facts of present situation only.

It is our view that the matter or subject of the first paragraph of the governor's proclamation is the fixing of the number of the members of the Senate and of the House of Representatives of the General Assembly of Missouri and providing the method and times for reapportionment of the Senate and House of Representatives and that the General Assembly may enact such measures as it deems proper concerning this subject or the General Assembly may refuse to act on such subject or matter. The provision in Paragraph One of the Proclamation that the General Assembly can act on the subject of the number of members and the times and method of reapportionment of the Senate and House of Representatives only by a joint resolution submitting a constitutional amendment to the people and the provision that reapportionment of the Senate and House of Representatives must be by separate bipartisan commissions, are not part of the "subject" of the Governor's proclamation and cannot restrict the authority of legislature to act as it sees fit on the subject of the proclamation. Such provisions are advisory only.



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The General Assembly can, under Paragraph 2 of the Governor's proclamation, act or refuse to act on the subject of repeal of those sections of Chapter 22, Revised Statutes of Missouri relating to apportionment in multi-district counties and the City of St. Louis and fixing the number of the House of Representatives in accordance with the present provisions of Section 9 of Article III of the Constitution of Missouri.


The General Assembly can under Paragraph 3 of the Governor's proclamation act or refuse to act on the subject of a candidate for the House of Representatives filing his declaration of candidacy in the office of the Secretary of State and paying his filing fee to the State Treasurer of his political party.

We are not in this opinion making any holding as to the areas of the subject of the proclamation which must be acted upon by constitutional amendment and which may be acted upon by constitutional amendment or by statute.

#### CONCLUSION

The legislature in a special session is authorized to act or not act upon the subject or matter within the scope of the Governor's proclamation or call.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

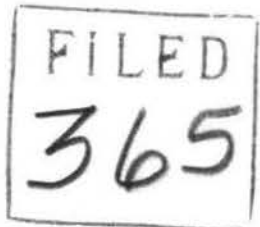


SHERIFFS: (1) Increase mileage allowed  
COUNTY CLERKS AND DEPUTIES: sheriff under Senate Bill No.  
PROBATE CLERKS: 87, effective October 13, 1965.  
COUNTY HIGHWAY ENGINEERS: (2) Increase in amount available  
COUNTY OFFICERS: under Senate Bill 89, for deputy  
SALARIES: clerks in third class counties,  
effective October 13, 1965. (3) in-  
crease in amount available under House Bill No. 71, for probate  
clerks effective October 13, 1965. (4) Increase in salary for  
county highway engineers under House Bill No. 473, does not apply  
to present term of office. (5) Salary increase under Senate Bill  
No. 88, for county clerks does not apply to present term of office.  
(6) Increase in amount available for deputy county clerks in fourth  
class counties under Senate Bill No. 88, effective October 13, 1965.  
(7) Increase in compensation for county clerks, except in second  
class counties under Senate Bill No. 90, effective October 13, 1965.  
(8) Increase in compensation under Senate Bill No. 90, prorated on  
monthly basis.

November 19, 1965

Opinion No. 365

Honorable Haskell Holman  
State Auditor  
Capitol Building  
Jefferson City, Missouri



Dear Mr. Holman:

In your letter of September 24, 1965, you inquire when the salary and expense provisions provided for in the following bills enacted by the 73rd General Assembly of Missouri become effective and operative.

Article VII, Section 13 of the Constitution of Missouri, 1945, provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Senate Bill No. 87, 73rd General Assembly, (Section 57.430 VAMS 1965) increases the mileage allowance to be paid the sheriff and his deputies for "actual and necessary expenses for each mile traveled in serving warrants" etc., in class three and four

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counties. In an opinion issued by this office on December 6, 1961, to Honorable James E. Woodfill, Prosecuting Attorney of Vernon county, Nevada, Missouri, it was held that Section 13, Article VII of the Constitution of Missouri does not prohibit the increase in reimbursement for sheriffs and their deputies for mileage actually traveled in performing their official duties. A copy of this opinion is enclosed.

It is the opinion of this office that such mileage allowance provided for in Senate Bill No. 87 is not compensation as that term is used in Article VII, Section 13 of the Constitution of Missouri, 1945, and the provisions of said bill became effective on October 13, 1965.

Section 51.450, RSMo 1959, authorized the county clerks in class three counties to employ deputies and assistants and determine the amount of compensation to be paid with the maximum amount set at four thousand dollars per year. Senate Bill No. 89, 73rd General Assembly, (Section 51.450 VAMS 1965) repeals and reenacts said section omitting the maximum amount of four thousand dollars.

In an opinion issued by this office on October 22, 1953, to Haskell Holman, State Auditor, it was held that an increase in the amount available to the county clerk for clerical hire or additional compensation for deputies or assistants is not in conflict with Article VII, Section 13 of the Constitution of Missouri, 1945, prohibiting the increase of compensation to a county officer during his term in office. This is due to the fact that the individuals concerned have no definite term of office. A copy of this opinion is enclosed herewith. Therefore, it is the opinion of this office that the provisions of Senate Bill No. 89, for additional compensation for deputies and assistants became effective October 13, 1965.

House Bill No. 71, 73rd General Assembly (Section 483.475 VAMS 1965) relates to the compensation and number of probate clerks, assistants, and stenographers. This bill does not provide for their appointment for any definite period of time, but it does provide they may be removed at the discretion of the probate judge. They do not have a definite term of office. It is our opinion this bill is not in conflict with Article VII, Section 13, of the Constitution of Missouri 1945, because the individuals concerned do not have a definite term of office and that the provision of said bill became effective on October 13, 1965.

House Bill No. 493, 73rd General Assembly (Section 61.190 VAMS 1965) in effect amends Section 61.190, RSMo 1959, to provide for an increase in the salary of the county highway engineer in class two, three, and four counties. Section 61.160, RSMo 1959, provides for the county court in class two, three, and four counties to appoint a highway engineer "for such length of time as may be deemed advisable in the judgment of the county court".

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In an opinion issued by this office dated September 30, 1957, to Eldred Seneker, it was held that the county highway engineer appointed by the county court for a definite period of time is an officer whose compensation cannot be increased during the term for which he was appointed, under the provisions of Article VII, Section 13 of the Constitution of Missouri, 1945. A copy of such opinion is enclosed.

It is our opinion that the additional compensation provided in House Bill No. 493, 73rd General Assembly, is not payable to a county highway engineer appointed prior to October 13, 1965, when this bill became effective, and said officers are not entitled to the increase in compensation provided for in said bill during the terms for which they have been appointed. It is effective as to county highway engineers appointed after that date.

Senate Bill No. 88, 73rd General Assembly, repealed Sections 51.350 and 51.460 RSMo 1959, and reenacts Sections 51.350 and 51.460 VAMS 1965 in lieu thereof. Section 51.350 deals with the salary of county clerks in fourth class counties. Section 51.460 deals with the allowance to the county clerk for compensation of deputy clerks and assistants in fourth class counties. Under Section 51.350 RSMo that was repealed, the salary of county clerks in fourth class counties was based on the population of the counties. It provided that in counties with the population of less than 7,500, the salary of the county clerks would be \$1,000, and in counties with the population of 7,500 to less than 10,000, the salary would be \$1,100. Although this section provided for salaries of county clerks in excess of these amounts in fourth class counties with a population of 10,000 or more, there are no such counties. Senate Bill No. 88, provides that the salary in all counties of fourth class, without regard to population, shall be \$1,700. This results in an increase in the salary of such officers which is prohibited by Article VII, Section 13 of the Constitution because it is an increase in compensation of county officers during their present terms of office.

It is the opinion of this office, that county clerks in the fourth class counties are not entitled to receive the increase in compensation provided for under Senate Bill No. 88, 73rd General Assembly, Section 51.350 VAMS 1965, during their present terms of office.

In regard to the provision of Senate Bill No. 88, insofar as it authorizes an increase in the amount allowed for compensation

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for deputy clerks and assistants, since these persons do not have a definite term, Article VII, Section 13 of the Constitution of Missouri, 1945, does not apply. Therefore, it is our opinion that the provision of Senate Bill No. 88, providing for an increase for the allowance of compensation for deputy clerks and assistants, became effective October 13, 1965.

Senate Bill No. 90, 73rd General Assembly (Sections 51.135 and 51.285 VAMS 1965) requires the county clerk of each county court in this state to provide the revisor of statutes with a complete list of each local option law that has been adopted and is in effect in his county. It requires this list to be mailed to the revisor of statutes before July 1, 1966, and thereafter, the clerk is to notify the revisor of statutes promptly upon the adoption by a vote of the people of any future local option law. Hence, this law provides for compensation to be paid clerks of certain counties for those extra duties assigned to them.

It has been held by the Supreme Court of this state that compensation for extra duties required by a county official by statute not ordinarily incident to or germane to the present duties, is not in conflict with the provisions of Article VII, Section 13 of the Constitution. *Little River Drainage District v. Lassater*, 29 S.W. 2d 716, 325 Mo. 493.

Senate Bill No. 90, provides for additional duties to be performed by the county clerk in each county of the State, and provides for additional compensation for such duties, in certain class counties, the amount of compensation depending upon the population of the county. The additional duties assigned under this bill are not ordinarily incident to or germane to their present duties. This does not conflict with the above Constitutional provision. However, it expressly provides that in years 1965 and 1966 only the county clerks in counties other than in second class counties shall receive the extra compensation. Therefore, all county clerks in counties other than second class counties are entitled to the additional compensation after October 13, 1965, for 1965 and 1966.

Senate Bill No. 90, provides for additional compensation on a yearly basis. You inquired whether the additional compensation was to be paid in one sum or to be prorated.

Section 50.330 RSMo 1959, provides that any salary provided for a county officer, deputy, or assistant shall be paid in monthly installments on the first of each month.

It is our opinion that the additional compensation provided for in House Bill No. 90 is to be prorated each month on a yearly basis, so that each month the officer receives 1/12 of such salary increase and for the month of October, 1965, the proportionate part of such monthly salary for the period October 13, when the



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bill became effective to the end of the month. Therefore, county clerks are not to receive the full amount of the annual compensation provided therein for the year 1965.

#### CONCLUSION

It is therefore the opinion of this office that:

- (1) The increase in mileage allowance provided for in Senate Bill No. 87, 73rd General Assembly (Section 57.430 VAMS 1965) for sheriffs and their deputies, became effective October 13, 1965.
- (2) The increase in the amount available to county clerks for deputies, assistants and clerks, under Senate Bill No. 89, 73rd General Assembly (Section 51.450 VAMS 1965) became effective October 13, 1965.
- (3) The increase in amount allowed as compensation of probate clerks, assistants and stenographers, under House Bill No. 71 73rd General Assembly (Section 483.475 VAMS 1965) became effective October 13, 1965.
- (4) Increase in salaries for the county highway engineer in Class 2, 3 and 4 counties under House Bill No. 493, 73rd General Assembly (Section 61.190 VAMS 1965) does not apply during the present term of such officers. It does apply to any such officer appointed after October 13, 1965.
- (5) The salary increase for county clerks in fourth class counties provided for in Senate Bill No. 88, 73rd General Assembly (Section 51.350 VAMS 1965) does not apply during the present term of such officers.
- (6) The additional amount of money that may be allowed to county clerks in all fourth class counties for deputy and clerical hire as provided under Senate Bill No. 88, 73rd General Assembly (Section 51.460 VAMS 1965) became effective October 13, 1965.
- (7) The increase in compensation for county clerks in all counties in the State, except second class counties, provided for under Senate Bill No. 90, 73rd General Assembly (Sections 51.135 and 51.285 VAMS 1965) became effective October 13, 1965.



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(8) The additional compensation provided for in Senate Bill No. 90, 73rd General Assembly (Sections 51.135 and 51.285 VAMS 1965) is to be prorated each month on a yearly basis, so that each month the officer is to receive 1/12 of the yearly salary payable on the first day of each month, and for the month of October, 1965, the proportionate part of such monthly salary for the period October 13, 1965, when the bill became effective to the end of the month.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

*Norman H. Anderson*

NORMAN H. ANDERSON  
Attorney General

Enclosures:

Opinion #99(1961)  
Opinion #81(1957)

COUNTY FIRE DISTRICTS:

FIREMEN:

RETIREMENT:

RETIREMENT INSURANCE:

CONSTITUTIONAL LAW:

SPECIAL FUNDS:

MUNICIPAL CORPORATIONS:

House Bill No. 356, 73rd General Assembly (Section 321.220 as amended) Subsection 15 authorizing a pensioning program for firemen in Fire Protection Districts in counties of the first class is constitutional. House Joint Resolution Nos. 5 and 15 would allay any questions of constitutionality

of the pensioning program for firemen in Fire Protection Districts in counties of the first class. Under House Bill No. 52, 73rd General Assembly (Section 321.240 V.A.M.S. August 1965 Pamphlet) the Board in its discretion may provide for a program of pensions through an insurance company except that a mutual company having an unlimited assessment liability may not be employed. The special fund raised for this purpose by taxation can only be utilized to provide a pension program.

Amended Opinion No. 366

November 9, 1965

Honorable Donald J. Gralike  
112 Buckley Meadows  
St. Louis 25, Missouri



Dear Representative Gralike:

This opinion is written in response to your inquiry concerning House Bill 356 of the 73rd General Assembly which provides, in part, that a fire district within a county of class one may formulate a retirement plan for employees.

You pose the following questions:

"1. In the event that the voters would approve a pension program under House Bill No. 356, Section 321.220, Subsection 15, would such a program of pensioning be constitutional or would the same be contrary to Section 25 of Article VI of the constitution?

"2. Since no provision is made for a constitutional amendment as was done by the prior legislature under House Joint

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Resolution No. 33, would this be cured by House Joint Resolution No. 5, especially since no provision is made for political subdivisions other than municipalities?

"3. Under House Bill No. 52 which provides for the funding of such a program and the depositing of the revenues in a special fund to be used for the pension program, could a fire district fund this through a program of annuities through an insurance company?"

Your first question has been answered in our Opinion Attorney General No. 329, Cantrell, dated September 27, 1962, (which is attached). We concluded that the act was constitutional under our interpretation of Chapter 321, RSMo, (as amended). Our opinion has not been changed because of amendments.

House Joint Resolution Nos. 5 and 15 of the 73rd General Assembly clearly defines the constitutional authority of political subdivisions in this area. Such an amendment would allay any questions that might exist as to the constitutionality of Section 321.220, RSMo, (as amended) regarding the pensioning of firemen in Fire Protection Districts in counties of the first class.

We believe your third question is answered, in effect, by letter of the Attorney General in response to opinion request No. 395, Schecter, October 31, 1962, (which is attached). In this letter (No. 395), we say: "In view of the unrestricted authority granted by Section 86.583, RSMo, (here it is Section 321.220 as amended) we know of no reason why the provision for the pensioning of \* \* \* firemen pursuant to that section could not be accomplished by an arrangement with an insurance company".

This position is predicated upon one of the accepted rules of statutory construction. In this instance, the rule is that a power given by statute carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the power that is expressed. (Reilly v. Sugar Creek Township of Harrison County, 139 S.W. 2d 525, 526; State ex rel Brokaw v. Board of Education of St. Louis et al, 171 S.W. 2d 75, 82; City of Flordell Hills v. Hardekopf, 271 S.W. 2d 256, 257; Petition of City of Liberty, 296 S.W. 2d 117, 123) The purpose of these rules of construction is to reach the true intent of the lawmaking authority - the General Assembly. (State ex rel

Honorable Donald J. Gralike

Brokaw v. Board of Education of St. Louis, supra l.c. 79).

Under House Bill No. 52, 73rd General Assembly, (Section 321.240, RSMo, as amended) the proceeds of the "additional rate" is to be "deposited in a special fund and used only for the pension program of the district". Thus, a power to set up a pension fund has been given to a municipal corporation without limiting the mode of effectuating that power. Based on the authorities cited in the paragraph (supra), we conclude the Board may exercise that power in any lawful and reasonable manner which it deems expedient in order to effect the purpose for which the power is given. It can be expended only for pensions.

#### CONCLUSION

It is the opinion of this office that:


1. The pensioning program for firemen in Fire Protection Districts in counties of the first class created under House Bill 356, 73rd General Assembly (Section 321.220, RSMo, as amended) is constitutional.

2. House Joint Resolution Nos. 5 and 15, 73rd General Assembly, would allay any question of constitutionality of the amendments to Section 321.220, RSMo, regarding pensions for firemen in Fire Protection Districts in counties of the first class.

3. Under House Bill No. 52, 73rd General Assembly, (Section 321.240 V.A.M.S. August 1965 Pamphlet) the special fund in the discretion of the Board could be utilized to provide a program of annuities through an insurance company except that a mutual insurance company having an unlimited assessment liability may not be employed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Richard C. Ashby.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

APPROPRIATION:  
CONSTITUTION:  
GENERAL ASSEMBLY:  
LEGISLATURE:  
LIQUOR:

Monies collected under House Bill No. 292, 73rd General Assembly, enacted as Section 311.328 (5), V.A.M.S. <sup>August</sup> September 1965 Pamphlet, should be paid into the treasury as general revenue. It is our further opinion that Section 4.645, Conference Committee Substitute for House Bill No. 4, 73rd General Assembly, is not unconstitutional.

OPINION NO. 368

December 2, 1965

Mr. Eugene P. Walsh  
Legal Assistant to Governor  
Executive Office  
Jefferson City, Missouri



Dear Mr. Walsh:

This is in answer to your request for an opinion concerning two statutes enacted by the 73rd General Assembly.

<sup>August</sup> Your first question concerns House Bill No. 292, 73rd General Assembly, enacted as Section 311.328, V.A.M.S. September 1965 Pamphlet. House Bill No. 292 provides for identification cards to be issued by the Department of Liquor Control to any person proving to be over twenty-one years of age. The identification cards are to aid liquor licensees in determining the age of purchasers. Specifically you ask if subsection 5 authorizes expenditures by the Liquor Department of the monies collected under House Bill No. 292. Subsection 5 reads as follows:

"The fees collected under authority of this section shall be used to cover the costs of administration, and any surplus over and above the costs of administration shall be put into a general fund of the department of liquor control to be used in the enforcement of the nonintoxicating beer law and intoxicating liquor law of the State of Missouri."

Article III, Section 36, Constitution of Missouri, reads as follows:



Mr. Eugene P. Walsh

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

First: For payment of sinking fund and interest on outstanding obligations of the state.

Second: For the purpose of public education.

Third: For the payment of the cost of assessing and collecting the revenue.

Fourth: For the payment of the civil lists.

Fifth: For the support of eleemosynary and other state institutions.

Sixth: For public health and public welfare.

Seventh: for all other state purposes.

Eighth: for the expense of the general assembly."

Article IV, Section 28, Constitution of Missouri, reads as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the

Mr. Eugene P. Walsh

comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

It is our opinion that subsection 5 would be invalid if it is construed as providing that the Liquor Department may spend directly the money it collects. However, statutes are presumed to be constitutional and when one construction of a statute will make it constitutional it will be so construed. *Milgram Food Stores, Inc. v. Ketchum, Mo.*, 384 S.W.2d 510. Therefore, all money collected under this act shall be paid into the treasury to be appropriated by the general assembly.

It has been held that the legislature can enact a statute which provides that monies collected pursuant to the statute can be put in a special fund in the state treasury as long as it is still subject to proper appropriation. *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093 (1901); *State ex rel. Kessler v. Hackmann*, 304 Mo. 453, 264 S.W. 366 (1924). The court in the *Fath* case, *supra*, said this, 1.c. S.W. 1096:

"It does not follow, because the legislature is required to pursue a specific order in passing appropriation bills, that it may not provide a tax for a public purpose, and require it to be paid into the treasury and set apart in a special fund, subject to a subsequent appropriation for the purpose for which it was levied, or, for that matter, to some other

Mr. Eugene P. Walsh

public purpose, when unrestrained by a constitutional limitation."

In the Fath case, supra, the court was considering the following statutory provision, l.c. S.W. 1094:

"Sec. 5. The moneys received by the state treasurer under the provisions of this act which shall exceed in any one year the amount required by section four of this act to be deposited to the credit of the 'State Seminary Moneys,' shall be deposited in the state treasury to the credit of a fund to be known as the 'Educational Funds,' which is hereby created and established. The moneys deposited in the said fund shall be appropriated by the general assembly for public educational purposes."

And, in the Kessler case, supra, the court was considering a statute with the following language, l.c. S.W. 367:

" \* \* \* Provided, however, that all moneys collected by the board or its treasurer shall be paid into the state treasury, there to constitute a fund for the purpose of carrying out the provisions of this act \* \* \*."

In both the above quoted statutes the legislature specifically created special funds. In subsection 5 of House Bill No. 292 no such specific language was used. It is our opinion that the legislature merely indicated a general intention that the monies collected be expended for certain purposes. Therefore the money should be put into the treasury as general revenue.

Your second question concerns the constitutionality of Section 4.645, Conference Committee Substitute for House Bill No. 4, 73rd General Assembly. House Bill No. 4 is an appropriation act:

"To appropriate money to pay the salaries, wages and per diem and

Mr. Eugene P. Walsh

other expenses of the civil of-  
ficers and employees of the state,  
\* \* \*

Section 4.645 reads as follows:

"TO THE DIVISION OF GEOLOGICAL SURVEY AND WATER RESOURCES

"All moneys received from the  
federal government, or any agency  
thereof, or from any other source,  
deposited in the State Treasury for  
the use of the Division of Geological  
Survey and Water Resources."


Section 4.645 itself states that the money that is appro-  
priated is from funds deposited in the state treasury.  
Therefore, the section is not in conflict with Article III,  
Section 36, or Article IV, Section 28, Missouri Constitution.

#### CONCLUSION

It is the opinion of this office that the monies collected  
under House Bill No. 292, 73rd General Assembly, enacted as  
Section 311.328 (5), V.A.M.S. September 1965 Pamphlet, would  
be paid into the treasury as general revenue. It is our  
further opinion that Section 4.645, Conference Committee  
Substitute for House Bill No. 4, 73rd General Assembly, is not  
unconstitutional.

The foregoing opinion, which I hereby approve, was  
prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



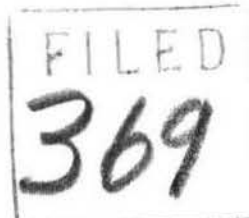
Norman H. Anderson  
Attorney General

SCHOOLS: Publication of financial report, Section 165.111,  
NEWSPAPERS: must be in a newspaper meeting requirements of  
Section 493.050.

OPINION NO. 369

October 8, 1965

Honorable Peter H. Rea  
Prosecuting Attorney  
Taney County  
Forsyth, Missouri



Dear Mr. Rea:

This official opinion is issued in response to your request of September 29, 1965, for a ruling of this office.

You inquire whether the school district financial report required to be published by Section 165.111, RSMo. Supp. 1963 Appendix, must be in a newspaper which meets the requirements of Section 493.050, RSMo 1959.

Section 165.111 provides:

"1. The school board of each six-director district shall make and publish annually, not later than August first, in some newspaper published in the school district, and if there is none then in some newspaper of general circulation within the district, a statement of all receipts of school moneys, when and from what source derived, and all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all purposes for the year. . . ."

Thus, the school district is required by law to publish this financial report.

Section 493.050 provides "all public advertisements and orders of publication required by law to be made . . . shall be published in (newspapers meeting requirements specified)." Since the school district financial report is a publication required by law, it necessarily follows that it must be published in a newspaper that meets the requirements specified in Section 493.050.



Honorable Peter H. Rea

By the same course of reasoning this office has previously ruled that the financial report of a third class city which is required to be published by Section 77.110, RSMo 1959, must be published in a newspaper meeting the requirements of Section 493.050 (Opinion No. 38, Hayner, September 29, 1961, copy enclosed).

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Enclosure

TAXATION:  
MERCHANT'S LICENSE:  
MANUFACTURER'S LICENSE:

Interest and penalty on delinquent  
merchant's and manufacturer's license.

OPINION NO. 371

November 8, 1965

Honorable Donald J. Stohr  
County Counselor  
St. Louis County Courthouse  
Clayton, Missouri 63105



Dear Mr. Stohr:

This is in answer to your request of September 30, 1965, for an opinion from this office concerning the penalty and interest to be charged on delinquent merchants' and manufacturers' license taxes under Senate Bill No. 356, 73rd General Assembly, and whether said bill applies to St. Louis County. (Section 150.235 VAMS August 1965 Pamphlet)

"Any person who shall fail to pay to the Collector of Revenue any merchant's and manufacturer's tax on the property of such person in said county on or before the 31st day of December next after the same shall have been assessed and levied, such tax shall be deemed delinquent, and said delinquent taxpayer shall pay in addition to such taxes which said taxpayer may stand charged on the tax books of such county a penalty of one per cent per month plus ten per cent interest, provided that such penalties shall not exceed more than ten per cent per annum."

This bill was introduced in the Senate on March 8, 1965. Under the provisions of the original bill, it was applicable only "in counties of the first class not having a charter form of government." The bill was later amended by striking out the above quoted provision.

There is a legal presumption that a statute is valid; that if there is doubt as to the constitutionality of the statute, the doubt should be resolved in favor of the constitutionality of the act; that the expediency or in expediency of the act is not for the courts; that the power of the Legislature to enact laws has no limitation except that expressed in the State and Federal Constitution. State ex inf. Barker vs. Merchants' Exchange, 269 Mo. 346.

Honorable Donald J. Stohr

The primary rule of statutory construction is to ascertain and determine the intent of the Legislature and, as far as possible, give effect to the intention expressed. One method utilized to determine this intent is to review the Legislative history of the bill. One of the accepted canons of statutory construction permits, and often requires, an examination of the historical development of the legislation, including changes therein and related statutes, and the whole statute should be construed on the theory that the lawmakers intended to accomplish something by the change. State ex rel. Klein vs. Hughes, 173 S.W.2d 877; Ex parte Helton, 93 S.W. 913; Household Finance Corp. v. Robertson, 364 S.W.2d 595.

Applying these rules of construction, it is the opinion of this department that Senate Bill No. 359, as enacted, is a general statute in effect in all counties of the state including St. Louis County.

Chapter 150, RSMo 1959, provides for the licensing and taxing of merchants and manufacturers in this State. It requires each merchant or manufacturer in the State, as defined therein, to be licensed and pay an ad valorem tax each year on the goods, wares, and merchandise, raw materials and manufactured products. Provision is made therein for the collection of this tax by the county collector of revenue. Senate Bill No. 356, supra, provides a penalty for failure of said merchants and manufacturers to pay said tax.

In regard to the penalty, said bill provides that any person who fails to pay the collector any merchant's and manufacturer's tax when due shall, in addition to said tax, pay "a penalty of one per cent per month plus ten per cent interest, provided that such penalties shall not exceed more than ten per cent per annum." It is noted that there are two separate matters dealt with in this provision. One is "penalty", the other is "interest".

Under the above statutory provision a penalty of one per cent of the total tax is to be collected for each month the tax is delinquent; in addition thereto, the taxpayer is required to pay ten per cent interest. The provision in such section providing that "ten percent interest" is to be paid by the delinquent taxpayer does not authorize a flat charge of 10% of the amount of the delinquent tax regardless of the time of payment of such delinquent tax, but does authorize the charging of interest at the rate of 10% per year until the delinquent tax is paid.

Honorable Donald J. Stohr

In the absence of any provision to the contrary, the rate of interest is to be computed on an annual basis. First National Bank vs. Kirby, 175 S.W. 926; Finley vs. Acock, 9 Mo. 841.

CONCLUSION

It is our opinion that the "ten per cent interest" provided for in Senate Bill 356, 73rd General Assembly, Section 150.235 VAMS August Pamphlet, means ten per cent per annum or five-sixths of one per cent per month each month the tax is delinquent and in addition thereto a penalty of one per cent per month not to exceed a total of ten per cent per annum for each year the tax is delinquent. This act applies to each and every county in the State.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

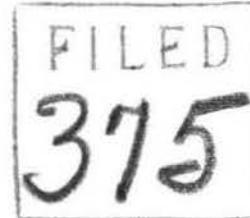
Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

Senator Raymond Hopfinger-

Opinion No. 375  
Answered by Letter (Ashby)

October 11, 1965



Senator Raymond Hopfinger  
3227 Cross Keyes Drive, Apt. 1  
Florissant, Missouri

Dear Senator:

This letter is in response to your telephone call wherein you submitted the following facts and based on these facts, this question which is set out below:

The City of Florissant is a constitutional charter city. It has nine council members and a mayor. Assuming a bill was properly before the council, and three councilmen voted "for" the bill; three voted "against" and three abstained from voting, what is the status of such a bill?

Article III of the Charter of Florissant deals with the council, its organization and powers. Section 3.1, thereof, provides that the council shall consist of nine members. Section 3.5 provides that the council shall determine by ordinances its own rules. Section 3.7 states "the affirmative vote of a majority of the members of the council shall be necessary to adopt any ordinance, resolution, or motion."

Section 2 of Ordinance 1340 adopted September 23, 1963, provides in part that the president shall decide all questions of order and procedure in accordance with Robert's Rules of Order.

In discussing the subject of tie votes Robert in his "Rules of Order," Section 46 at page 191, has this to say:

" \* \* \* On a tie vote the motion is lost, \* \* \* "

It is clear that when the vote is three "for" and three "against" there is a tie vote and there is no majority regardless of the number of abstentions.



Senator Raymond Hopfinger

This ruling is to be distinguished from Attorney General's Opinion No. 249, Schechter, dated August 6, 1965, on the law and facts. On the facts here, you have a tie vote and under Robert's Rules of Order, the motion then pending must be considered lost. In opinion no. 249 there was a clear majority of the votes cast by the aldermen for the bill.

We therefore conclude that on the facts stated and the question asked that the bill failed to meet the requirements of the city charter for passage.

We trust this explanation will constitute a satisfactory answer for your purposes.

If there is anything further we can do for you, please feel free to call upon this office for assistance.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

RA:am/df



October 6, 1965

Honorable Philip G. Hess  
Prosecuting Attorney of Jefferson County  
Hillsboro, Missouri

Dear Mr. Hess:

This is in answer to your letter of recent date in which you state that the presiding judge of the county court of Jefferson County, a second class county, is in the hospital and may remain in the hospital for sometime. You state that the county clerk has under provisions of Section 49.070 designated one of the associate county judges as presiding judge of the court during the absence of the elected presiding judge.

You ask whether the county clerk has a right to refuse to serve as budget officer of the county if the county court designates such county clerk to be budget officer.

It is the view of this office that the county clerk is without authority to refuse to serve as budget officer of a second class county if he is designated by the county court to serve as such officer.

Section 50.530 RSMo. 1959, applicable to second class counties provides in part as follows:

"As used in sections 50.530 to 50.660.

"(2) 'Budget Officer' means the county auditor in class one counties, and the presiding judge of the county court in class two counties, unless the county court designates the county clerk as budget officer."

Honorable Philip G. Hess

Under the provisions of Section 50.530 (2) it is the statutory duty and obligation of a county clerk to serve as budget officer in a second class county if he is so designated by the county court. When the county court designated the county clerk as budget officer, the effect is the same as if the statute specifically designated the county clerk as budget officer.

There is no more authority for the county clerk to refuse to perform the duties enjoined upon him by such statute than there is for the county clerk to refuse to perform any other statutory obligation of his office. The county clerk has no authority to determine which statutory duties he shall perform but is required to perform all of the statutory obligations imposed upon the office of county clerk.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

NHA

CRIMINAL LAW: Abandonment and failure to support child  
ABANDONMENT: prior to October 13, 1965, misdemeanor.  
CHILD ABANDONMENT: Abandonment after October 13, 1965, con-  
FAILURE TO SUPPORT: stitutes felony.  
CHILDREN:

OPINION NO. 377

December 14, 1965



Honorable Don E. Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri 65802

Dear Mr. Burrell:

This is in response to your request for an opinion as follows:

"I would like your opinion as to the interpretation of Section 559.356 which goes into effect October 13, 1965. The Section provides a felony in the event of a man who leaves the State of Missouri and takes up his abode in some other state and leaves his child who is under sixteen years of age in the State of Missouri, and, without just cause or excuse, neglects or refuses to provide his children with adequate food, etc.

"Suppose that on October 13, 1965, a man who has been living in another state for a period of several months has children in Missouri which he is failing to support. Is this man subject to prosecution under this statute, or does he have a good defense based on the fact that he left Missouri prior to October 13, 1965? If he does have such a defense, would this defense still be good if it could be proven that he made at least an overnight visit to Missouri after October 13, 1965?

"Your assistance in this matter will be appreciated."

The new law in question, Senate Bill 183, 73rd General Assembly, replaced Section 559.350, RSMo 1959, which made the offense a misdemeanor. It is now a felony and, therefore, to apply it to an offense which was committed prior to the new

Honorable Don E. Burrell

law taking effect would be prohibited by both our state and federal constitutions as being ex post facto, because it increases the possible punishment. Article 1, Section 10, Clause 1, Constitution of the United States; Article 1, Section 13, Constitution of Missouri, 1945; State ex rel Jones v. Nolte, Mo., 165 S.W.2d 632; Kring v. Missouri, 107 U.S. 221.

Thus, where the abandonment and failure to support, the evil at which the law is aimed, occurred prior to October 13, 1965, the prosecution could not be under the new law. The abandonment must be proved in addition to the failure to support, so, even though the failure to support at the present time can be shown, the element of abandonment must also be shown as a part of such crime. Since the abandonment in the case inquired about took place before the effective date of the law the increased punishment would not be applicable in such a situation because of the ex post facto provisions of the State and Federal Constitutions.

However, such individual could be prosecuted under the Section of 559.353, V.A.M.S., September pamphlet, making such action a misdemeanor.

Furthermore, because it is the abandonment and failure to support at which the law is aimed, the mere passage through the state or an overnight visit here after an abandonment had already occurred would not constitute a new offense.

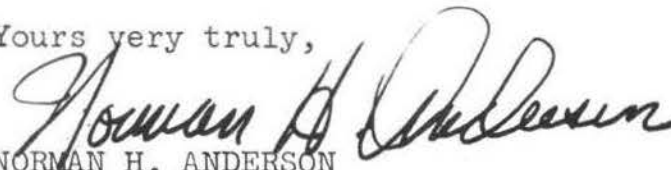
#### CONCLUSION

Section 559.356, V.A.M.S., September 1965 pamphlet which took effect October 13, 1965, and which increased the offense of abandoning a child in this state to take up abode in another state and failure to support such child from a misdemeanor to a felony cannot be made to apply to an abandonment occurring before that date.

Mere passage through the state or an overnight visit here after October 13, 1965, by a man who had previously abandoned a child in this state before that date would not bring the man within the purview of Section 559.356, V.A.M.S., September 1965 pamphlet.

The foregoing opinion which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General



OPINION NO. 383  
Answered by Letter  
(Randolph)

October 29, 1965



Honorable Charles G. Hyler  
Prosecuting Attorney  
St. Francois County  
Farmington, Missouri

Dear Mr. Hyler:

This letter is in answer to your request for an opinion, dated October 15, 1965, in which you ask the following questions:

"The Magistrate Judge of St. Francois County, Francis W. Rentfro, plans on appointing a lady as deputy clerk. This lady's mother married a man by the name of Gower. Mr. Gower and Judge Rentfro are second cousins.

"My question is the following:

"Is Judge Rentfro and the lady he expects to appoint, who is Mr. Gower's stepdaughter, related by affinity so as to fall within the constitutional provision?"

On October 14, 1965, we forwarded to you several opinions including an opinion dated November 10, 1934, to Owen C. Rawlings, which opinion we believe directly answers your question.

Under the provisions of Article VII, Section 6, of the Constitution of Missouri, and under the facts you have stated, the prospective employee is not a blood relative of the magistrate and hence not related by affinity, State v. Thomas, 351 Mo. 804, 174 S.W. 2d 337.

Honorable Charles G. Hyler

Also, the prospective employee is not related to the magistrate within the fourth degree, which is prohibited by the said constitutional provision.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

DLR/sj

CIRCUIT CLERK-RECORDER: Salary increase under Senate Bill  
COUNTY OFFICERS: No. 267 not applicable during  
COMPENSATION: present term of office.

November 9, 1965

Opinion No. 384

Honorable Robert B. Paden  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri 64469



Dear Mr. Paden:

In your letter of October 16, 1965, you submitted a request for an opinion as follows:

"The Honorable Oscar W. Moorman, Circuit Clerk-Recorder of DeKalb County, Missouri, has sought my opinion on the provisions of Section 483.335, RSMo 1959, as amended by Senate Bill No. 264 of the 73rd General Assembly, which is an increase in salary for his office. It is my opinion that the increase will not be effective until the next term of office, as there are no additional duties imposed under the act.

"Please give us your opinion as Mr. Moorman is not completely satisfied with mine."

Senate Bill No. 264, 73rd General Assembly, became effective October 13, 1965. It repealed and reenacted Section 483.335, RSMo, and as reenacted reads in part as follows:

"The circuit clerk and recorder in counties of the third class wherein the two offices have been combined, shall receive annually for his services, the following:

"(1) In counties having a population of less than seven thousand five hundred, the sum of four thousand four hundred dollars; \* \* \*"

DeKalb County has a population of 7, 226 according to the last decennial census, which places it within the classification of subdivision 1. Under Senate Bill No. 264, supra, the salary of the circuit clerk-recorder in counties of this classification is increased from \$3,200 to \$4,400 per annum.

Honorable Robert B. Paden

Article VII, Section 13, Constitution of Missouri, 1945, provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

The Circuit Clerk-Recorder of DeKalb County is a county officer within this constitutional provision.

This constitutional provision was construed by the Supreme Court in Mooney vs. County of St. Louis, 286 S.W. 2d 763. In that case the Court was considering Senate Bill No. 254 and Senate Bill No. 237, 66th General Assembly. Senate Bill 254 provided for a salary increase and Senate Bill No. 237 assigned additional duties for the Board of Election Commissioners of St. Louis County, Missouri. In discussing this constitutional provision the Court states, l.c. 766:

"[4] There can be no doubt but that the legislature may award extra compensation to an incumbent for the performance of certain newly imposed duties without violating the constitutional inhibition under consideration. State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S.W. 473; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S.W. 864; Denny v. Silvey, 302 Mo. 665, 259 S.W. 422; Little River Drainage Dist. v. Lassater, 325 Mo. 493, 29 S.W. 2d 716. 'Although new duties germane to an office are imposed on an officer, the compensation cannot be increased without violating the prohibition against an increase in compensation after election or appointment, or during the term of the office. \* \* \* However, such a provision does not prevent the legislature \* \* \* from providing that a change in the duties of an incumbent of an office shall be accompanied by \* \* \* an increase \* \* \* of compensation where the duties added \* \* \* are extrinsic or foreign to the office and not incidental or germane thereto.' 67 C.J.S., Officers, §95g.

"[5,6] The burden was on the plaintiffs to show that the increase in salary provided in S.B. 254 was intended by the General Assembly as compensation for the additional duties required by S.B.237.  
\* \* \*

Honorable Robert B. Paden

"In the instant case there was no statement in either S.B. 254 or S.B. 237 to the effect that the increase in salary was to compensate for added duties. Neither bill referred to the other. \* \* \*"

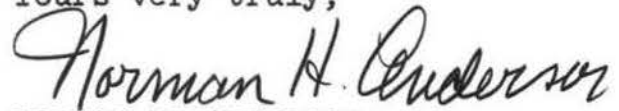
As heretofore stated, Senate Bill No. 264, supra, increases the compensation of the circuit clerk-recorder from \$3,200 to \$4,400 annually in counties of the classification of DeKalb County. It does not provide that the increase in compensation is for any additional duties required by statute to be rendered by said officers. To hold that it provides for an increase in compensation for said officials during the present term would be in conflict with Article VII, Section 13, of the Constitution.

#### CONCLUSION

It is the opinion of this office that the increase in compensation provided for in Senate Bill No. 264, 73rd General Assembly, does not apply to the Circuit Clerk-Recorder of DeKalb County during his present term of office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Moody Mansur.

Yours very truly,

  
NORMAN H. ANDERSON  
Attorney General

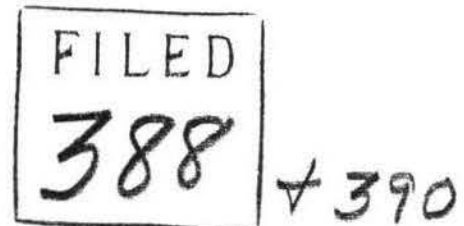


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circuit judge shall receive an additional \$3,000 per annum, each  
county contributing in equal amounts.

Opinions No. 388 and No. 390

November 8, 1965

Honorable Carroll M. Blackwell  
Prosecuting Attorney  
Callaway County  
Fulton, Missouri



Honorable Roderic R. Ashby  
Prosecuting Attorney  
Mississippi County  
Charleston, Missouri

Dear Sirs:

This opinion is in response to your inquiry concerning the amount of contribution by each county in a judicial circuit under Subsection 3 of Section 478.013, as amended by the 73rd General Assembly where the counties have allowed such additional compensation as provided by such amendment.

Section 478.013, RSMo. Cum. Supp. 1963, was repealed and a new section is enacted in lieu thereof by two bills, H.B. 390 and H.B. 459. These two bills are not identical. The pertinent portions, however, are as follows:

Subparagraph 3, of H.B. 390 reads as follows:

"All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state treasury. If the county courts of all of the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit. The county part of the salary shall be divided among the counties and be paid by them proportionately as the population of each county bears to the entire population of the circuit."

Honorable Carroll M. Blackwell

Subparagraph 3 of H.B. 459 reads as follows:

"All other judges of the circuit courts of this state shall each receive an annual salary of sixteen thousand dollars payable by the state out of the state treasury. If the county courts of all the counties composing a circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit the counties contributing equal amounts."  
(Emphasis added)

The underscored portions reveal a direct conflict in terms, that is to say, H.B. 390 provides the salary increase of three thousand dollars "shall be divided among the counties and paid by them proportionately as the population of each county bears to the entire population of the circuit."

House Bill 459 provides the counties shall contribute in "equal amounts."

House Bill 390 was passed by the legislature on June 15, 1965 (Senate Journal 84th day, p.1177) and signed by the Governor on the 29th day of June, 1965. Senate Substitute for House Bill 459 was passed by the legislature on June 28, 1965 (House Journal 92nd day, p.1707) and signed by the Governor on the 23rd day of August, 1965. Both became effective on the same day, viz., October 13, 1965.

To resolve this apparent conflict, we must construe these to arrive at some conclusion based on law. A basic guide in construing statutes is first to seek the intention of the lawmakers for the act and if possible, to effectuate that intent. (Julian v. The Mayor et al, 391 S.W.2d 864). Where two acts are passed at the same session relating to the same subject, they are in pari materia and to arrive at the legislative intent, they must be construed together (State ex rel. Karbe v. Rader, 78 S.W.2d 835, 1.c. 839; Hull v. Baumann, 131 S.W.2d 721, 1.c. 725). We recognize the law does not favor repeal by implication. The statutes must, if reasonably possible, be construed to maintain the integrity of both. (Gross v. Merchants-Produce Bank, 390 S.W.2d 591).

We have been unable to reconcile the provisions of H.B. 390 and H.B. 459 of the 73rd General Assembly. Sutherland on Statutory Construction, 3rd Edition, Volume 2, § 520 at p. 537, has this to say on the subject:

Honorable Carroll M. Blackwell

"To be in pari materia, statutes need not have been enacted simultaneously or refer to one another. However, application of the rule that statutes in pari materia should be construed together is most justified in the case of statutes relating to the same subject matter that were passed at the same session of the legislature, especially if they were passed or approved or take effect on the same day, and in the case where the later of two or more statutes relating to the same subject matter refers to the earlier. In these situations the probability that acts relating to the same subject matter were actuated by the same policy is very high, for in the first three cases they were enacted by the same men and in the last were declared to be within the knowledge of the legislature at the same time. But in construing an ambiguous enactment it is held proper to consider not only acts passed at the same session of the legislature or to which the act refers, but also acts passed at prior and subsequent sessions to which the act does not refer. However, if a subsequent act is in irreconcilable conflict with the act under consideration, the subsequent act must prevail."

This office believes H.B. 459 to be the subsequent or later bill. We base our opinion on the following words of the Supreme Court found in *State v. Harris*, 87 S.W.2d 1026 1.c. 1029, which are as follows:

" \* \* \* Section 4428 was approved by the Governor, April 6, 1927, and section 4061, April 8, 1927. Neither had an emergency clause, and both therefore took effect at the same time, ninety days after adjournment of the Legislature. The act approved April 6, 1927, section 1, of which now appears as section 4428, supra, contained a second section repealing 'all acts and parts of acts inconsistent with this act' (Laws 1927, p. 174). It could not, of course, have been the intention of the Legislature thereby to repeal section 4061, which was not then in existence. If either act is to be treated as later than the other, section 4061 would be the later act.

Honorable Carroll M. Blackwell

"Assuming for the purpose of this case that section 4428 is a valid enactment, we have, then, two legislative acts passed at the same session of the Legislature, taking effect at the same time and relating to the same general subject. They should be construed together and if possible harmonized so as to give effect to each. *Gasconade County v. Gordon et al.*, 241 Mo. 569, 581, 145 S.W. 1160 \* \* \*." (Emphasis added)

The Supreme Court, en banc, in *State on inf. Taylor v. American Insurance Company et al.*, 200 S.W.2d 1, 1.c. 14, stated:

" \* \* \* The provisions are necessarily repugnant and the later act controls. The rule is stated in *State ex rel. City of Republic v. Smith*, 345 Mo. 1158, 139 S.W.2d 929, 934(14,15), as follows:

"Moreover, where there are two acts on one subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as to repeal the first. *Meriwether v. Love*, 167 Mo. 514, 67 S.W. 250."

Accordingly, we conclude that the counties contribute in equal amounts under Subsection 3, of H.B. 459, 73rd General Assembly (Section 478.013, RSMo, as amended), because it was last enacted by the legislature and signed by the Governor.

This opinion is limited to the narrow question presented. You did not ask, we have not considered and do not pass on the constitutionality of these bills (Section 478.013 as amended).

#### CONCLUSION

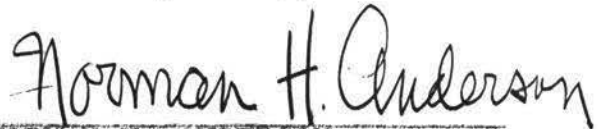
It is the opinion of this office that House Bill 459, 73rd General Assembly (Section 478.013, RSMo. Cum. Supp. 1963 as amended) is controlling. Where a conflict of provisions occurs between House Bill 459 and House Bill 390 (both passed by the 73rd General Assembly and amending Section 478.013, Cum. Supp. 1963) the provisions of House Bill 459, 73rd General Assembly will govern. Thus,

Honorable Carroll M. Blackwell

under Subsection 3, of House Bill 459 (Section 478.013, Cum. Supp. 1963 as amended) where the county courts of all the counties comprising the circuit so order, the judge of that circuit shall receive an additional three thousand dollars per annum to be paid by the counties composing the circuit, the counties contributing equal amounts.

The foregoing opinion, which I hereby approve, was written by my assistant, Richard C. Ashby.

Yours very truly,

A handwritten signature in cursive script that reads "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name and title.

NORMAN H. ANDERSON  
Attorney General

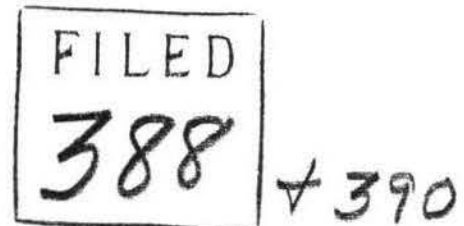


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November 8, 1965

Honorable Carroll M. Blackwell  
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Dear Sirs:

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Honorable Carroll M. Blackwell

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Honorable Carroll M. Blackwell

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Honorable Carroll M. Blackwell

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This opinion is limited to the narrow question presented. You did not ask, we have not considered and do not pass on the constitutionality of these bills (Section 478.013 as amended).

#### CONCLUSION

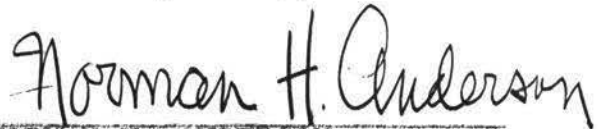
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Honorable Carroll M. Blackwell

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The foregoing opinion, which I hereby approve, was written by my assistant, Richard C. Ashby.

Yours very truly,

A handwritten signature in cursive script that reads "Norman H. Anderson". The signature is written in dark ink and is positioned above the printed name and title.

NORMAN H. ANDERSON  
Attorney General



October 29, 1965



Honorable Robert D. Scharz  
Superintendent, Division of Insurance  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Scharz:

By letter dated October 22, 1965, you requested an opinion from this office as to whether documents submitted by Modern Old Line Life Insurance Company are in accordance with Chapter 376 of the Statutes and are not inconsistent with the Constitution and Laws of this State and the United States. These documents consist of an executed copy of the Declaration of Intention of the original incorporators of Modern Old Line Life Insurance Company, a copy of the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and a photo copy of the Publisher's Affidavit as to publication of said Articles as required by Section 376.050, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959. It is noted that references to the statutes in the proposed Articles of Incorporation refer to the 1949 Revised Statutes of Missouri. The current official statutes are the 1959 Revised Statutes of Missouri. It is suggested that the proposed Articles be changed to reflect the current official statutes. The Section numbers are the same in the 1959 and 1949 Editions. It is also noted that Article Seven of the proposed Articles of Incorporation provides for a Board of Directors consisting of fifteen members. Article Seven also recites the names and addresses of the persons to serve as the initial Board of Directors and it is indicated thereby that only thirteen persons will serve as directors initially. Although it is unusual to designate membership to the Board of Directors at a number less than full membership, the thirteen persons provided are more than the minimum necessary

Honorable Robert D. Scharz

under Section 376.060 (5) and therefore a statutory insufficiency does not arise. Pursuant to the Articles, eight of the thirteen actual members will constitute a quorum.

It is the opinion of this office that the documents submitted for examination are in accordance with the provisions of Chapter 376 RSMo 1959 and are not inconsistent with the Constitution and Laws of this State and the United States.

The foregoing opinion which I hereby approve was prepared by my assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

TJD:aa

GENERAL ASSEMBLY: EXTRAORDINARY SESSION  
LEGISLATURE: EXTRAORDINARY SESSION  
EXTRAORDINARY SESSION:

Legislature at a special session can act on specific matters not suggested by Governor if such specific matters are within subject of Governor's proclamation.

October 29, 1965

Opinion No. 397



Honorable Bernard "Doc" Simcoe  
Missouri House of Representatives  
Jefferson City, Missouri

Honorable Luna Butler  
Missouri House of Representatives  
Jefferson City, Missouri

Dear Sirs:

By letter of recent date you requested an official opinion from this office as follows:

"We would like to have an opinion on whether the enclosed amendment to House Bill #1, page 4, is within the scope of the Governor's call of his First Extra Session.

"Page 3 of the first day's Journal, Monday, October 18, 1965, has his proclamation. Paragraph 4, sub-sections (a) and (b) recommends a \$5.00 increase to all old age assistance recipients and \$5.00 to permanently and totally disabled recipients but says nothing pertaining to eligibility of recipients.

"We question whether the proposed amendment goes farther than the Governor's Proclamation by changing eligibility requirements and whether this amendment would be in the scope of this Special Session."

House Committee Amendment No. 1 to House Bill No. 1 referred to in your letter changes the provision of existing law in regard to cash or securities that may be owned or possessed by a claimant for public assistance. Thus, eligibility requirements for public assistance recipients are the subject of the proposed amendment.

Honorable Bernard "Doc" Simcoe  
Honorable Luna Butler

Paragraph Four of the Governor's Proclamation convening the General Assembly in extra session requests legislation which would increase maximum payments for old age assistance recipients and for the permanently and totally disabled recipients. You have correctly concluded that House Committee Amendment No. 1 to House Bill No. 1 is not within the subject matter of Paragraph Four of the Governor's Proclamation.

However, your attention is directed to Paragraph Five of the Governor's Proclamation as follows:

"Paragraph Five. Amend Section 208.010, Missouri Revised Statutes, Cumulative Supplement, 1963, as follows:

a) To permit old age assistance payments to be made on behalf of persons sixty-five years of age, or over, in public or private institutions for the mentally ill and tubercular.

b) To permit the Division of Welfare to disregard five dollars per month income for each public assistance recipient in determining eligibility and the amount of the assistance payment."

Section 208.010, RSMo Cum. Supp. 1963, has as its subject matter eligibility for public assistance. The Governor has requested legislative action to change existing eligibility requirements for public assistance in two areas, viz.;

(a) To permit old age assistance payments for persons sixty-five years of age or over in institutions for the mentally ill and tubercular. Apparently such assistance is restricted at the present time pursuant to Section 208.010, 2., (5), and House Bill No. 1 proposes appropriate amendments thereto.

(b) To permit the Division of Welfare to disregard five dollars per month income in determining the eligibility of a claimant for public assistance. The income provisions in regard to eligibility for public assistance are set forth in Section 208.010, 1., and House Bill No. 1 proposes appropriate changes thereto pursuant to the Governor's request in this regard.

House Committee Amendment No. 1 to House Bill No. 1 proposes to change the eligibility requirements for claimants for public

Honorable Bernard "Doc" Simcoe  
Honorable Luna Butler

assistance in regard to the amount of cash or securities that a public assistance recipient may own or possess. Section 208.010, 2., (3), limits the cash or securities of a public assistance recipient to the sum of \$750.00 if single and \$1,000.00 if married. House Committee Amendment No. 1 proposes a change thereto by excepting therefrom life insurance and burial insurance of the surrender value of \$1,000.00.

Opinion No. 360, issued by this office on October 20, 1965, to the Honorable Mel Carnahan and the Honorable Ronald M. Belt, discussed in detail the lawful areas of legislative action pursuant to a proclamation by the Governor convening an extraordinary session. The questions raised in your request for an opinion are answered by the opinion referred to above and a copy of such opinion is enclosed. The opinion concludes that the legislature in a special session is authorized to act only upon subject matters within the scope of the Governor's Proclamation.

Paragraph Five of the Governor's Proclamation convening the 73rd General Assembly of the State of Missouri in First Extraordinary Session requests legislative action in regard to Section 208.010, RSMo Cum. Supp. 1963. The subject matter of the cited Section is eligibility for public assistance. The Governor's Proclamation has requested legislation changing two specific provisions of eligibility for public assistance. House Committee Amendment No. 1 to House Bill No. 1 proposes to change a third specific provision of eligibility for public assistance. Logic dictates that Paragraph Five of the Governor's Proclamation has for its subject matter eligibility for public assistance. Although the Governor has limited his request for legislative action to only two areas of this subject matter, the subject matter itself is before the General Assembly for legislative action and other areas of eligibility for public assistance may be lawfully acted upon by the General Assembly.

#### CONCLUSION


It is the opinion of this office that House Committee Amendment No. 1 to House Bill No. 1 of the First Extraordinary Session of the 73rd General Assembly is within the subject matter of Paragraph Five of the Governor's Proclamation convening the extraordinary session and therefore can be lawfully enacted.



Honorable Bernard "Doc" Simcoe  
Honorable Luna Butler

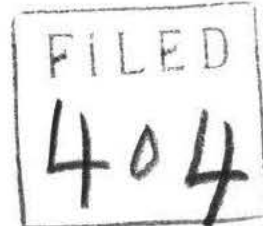
The foregoing opinion which I hereby approve was prepared  
by my assistant, Thomas J. Downey.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General

OPINION NO. 404  
Answer by letter  
(Murphy)

November 24, 1965



Honorable William W. Hoertel  
Prosecuting Attorney  
County Court House  
Rolla, Missouri

Dear Mr. Hoertel:

We have your letter of October 28, 1965 in which you request an opinion of this office on the construction of the operating authority granted by the Public Service Commission to a certain motor carrier. The terms of the Public Service Commission certificate granting the authority here in question are as follows:

**COMMON CARRIER, INTRASTATE IRREGULAR:**

With authority to transport commodities in bulk in dump trucks between all points and places within 50 miles of Sweet Springs, Missouri, also between all points in Missouri for road, bridge, revetment, dike, levee and airport contractors only.

Such service is authorized irrespective of the location of such points on the routes of regular route carriers.

We understand from your letter that the holder of the above quoted certificate has been engaged in hauling asphalt for a contractor who is presently occupied in the construction of a private parking lot.

The power to regulate the conduct of the intrastate motor carrier business and to issue certificates of convenience and necessity therefor is lodged by Missouri law solely in the Public Service Commission (See generally Chapter 387 RSMo 1959). For this reason we have thought it advisable to consult with the Commission on the question which you present. We have been furnished with a copy of a letter from the General Counsel of the Commission giving his opinion as to the construction of the above quoted authority. The relevant portion of that letter is as follows:

Honorable William W. Hoertel

"[I]t would seem that the Trucking Company has authority to haul for a contractor in the construction of roads anyplace in the State of Missouri but it does not appear that their authority would cover a contract for the construction of a parking lot."

Since this certificate was issued by the Public Service Commission we are inclined to defer to the interpretation placed upon it by the Commission's Chief Counsel. Further, this interpretation is in accordance with the general rule expressed by the maxim "inclusio unius est exclusio alterius", that is, the inclusion of one person or thing is the exclusion of all others.

For these reasons I share the view of the Public Service Commission that the operation here in question is in excess of the quoted certificate of authority.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

November 24, 1965



Honorable Fielding Potashnick  
Prosecuting Attorney  
Scott County  
Sikeston, Missouri

Dear Mr. Potashnick:

We have your request for an opinion as follows:

"We have several cases pending here in Scott County which are based on essentially the same facts. All the defendants are presently charged under Section 311.325, R.S.Mo. 1959. The facts are as follows:

"A minor who is the owner and/or operator of an automobile is stopped by the police for investigation and intoxicating liquor (usually beer) is found in the car. An adult also occupies the car and proves that he was the one who purchased the beer which is still cold. There is no evidence that the minor had been partaking of the beer or any other alcoholic beverages.

"If this minor guilty of possession under the above named statute?

"Would it make any difference if the minor were not the owner and/or operator of the automobile but still there was an adult in the car who had purchased the beer and the minor had not consumed any of it."

Frankly, we regard this matter as presenting a question of fact only. If, as you say, an adult in the car proves that he purchased the beer and there is no proof that the minor is, in

Honorable Fielding Potashnick

fact, the owner thereof then your case must necessarily fail.

The true ownership of the beer is, in final analysis however, a question for a jury to decide, but you must, in the first instance, convince a judge that there is sufficient factual matter to raise an issue. See *State vs. Nelson*, 21 S.W.2d 190.

There is, after all, a presumption of innocence which can only be overcome by positive evidence which does not seem to be contained in the situation which you outline. See *State vs. Castaldi*, 386 S.W.2d 392, 395 [1-3], for an analagous circumstance.

Very truly yours,

|  
NORMAN H. ANDERSON  
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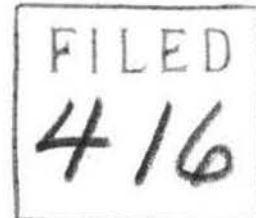


MOTOR VEHICLES: Pneumatic tires made of rubber, nylon, or some  
TIRES: similar synthetic, studded with metal inserts  
STUDS: as described herein, are not prohibited by  
statute in the State of Missouri.

OPINION NO. 416

December 17, 1965

Honorable Jasper Brancato  
State Senator, 11th District  
601 West 12th Street  
Kansas City, Missouri



Dear Senator Brancato:

This is in response to your inquiry for a formal opinion concerning metal studded tires.

You submitted the following question:

"I am requesting a formal opinion on whether tires with metallic studs or inserts are permitted to be used on the highways in the State of Missouri."

Missouri has no legislation dealing directly with the type of tire you mention. Some confusion, however, has arisen over the interpretation of Section 304.250, RSMo 1959, the pertinent portion of which is as follows:

"No metal tired vehicle shall be operated over any of the improved highways of this state, except over highways constructed of gravel or clay bound gravel, if such vehicle has on the periphery of any of the road wheels any lug, flange, cleat, ridge, bolt or any projection of metal or wood which projects radially beyond the tread or traffic surface of the tire, unless the highway is protected by putting down solid planks or other suitable material, or by attachments to the wheels so as to prevent such vehicles from damaging the highway, except that this prohibition shall not apply to tractors or traction engines equipped with what is known as caterpillar treads, when such caterpillar does not contain any projection of any kind likely to injure the surface of the road.

Honorable Jasper Brancato

Tractors, traction engines and similar vehicles may be operated which have upon their road wheels "V" shaped, diagonal or other cleats arranged in such manner as to be continuously in contact with the road surface if the gross weight on the wheels per inch of width of such cleats or road surface, when measured in the direction of the axle of the vehicle, does not exceed eight hundred pounds."

We note that some States have recently enacted legislation pertaining to the type of tire about which you inquire, including Kansas, which in its recent session of the legislature enacted K.S.A. 9-5, 106. Missouri has not enacted any recent legislation regulating the use of tires with metal inserts.

The Missouri statute, Section 304.250, supra, was first enacted in 1921 (approved July 30, 1921. Laws of 1921, First Extra Session, page 91; New Section). It appeared in the Revised Statutes of Missouri 1929, as Section 7776(c). The insignificant modification of pluralizing the word vehicle in the first phrase appeared when the excerpt was carried forward into Section 8384 (c), RSMo 1939. Subsequently, it was incorporated into the 1959 statutes as Section 304.250, with the word vehicle in the singular.

Consideration should be given to the date of original passage of this statute. At that time "metal tired vehicles" pertained to certain types of vehicles including, but not limited to, farm tractors and other farm implements with metal tires having metal cleats thereon. This statute must be considered and interpreted in the sense and in the light of the conditions and circumstances at the time it was enacted, that is, pertaining to those metal tired vehicles described therein.

The sentence structure of this statute makes it plain that the subject is "metal tired vehicle" and the prohibition is against any "such vehicle" using any "lug, flange, cleat, ridge, bolt or any projection of metal or wood." The thing that is prohibited to be done all relates back to the subject of metal tired vehicle. Manifestly the problem under study here, however, is the use by "rubber tired vehicles" with metal studs.

The statute refers to "vehicle," not to "motor vehicle." Chapter 301 relates to licensing of motor vehicles and Section

Senator Jasper Brancato

301.010(28) defines "vehicle;" Section 301.010(15) defines "motor vehicle;" Section 301.010(20) defines "pneumatic tires;" and Section 301.010(24) defines "solid tires." There are other definitions in the statutes of "motor vehicle" but we are unable to find a definition of a "metal tired vehicle." The term therefore should be deemed to be used in its commonly understood sense.

Study of the rest of the language in this fairly lengthy section of the statutes reinforces the belief that the condition which the legislature sought to prohibit was the use of metal tired tractors and other farm implements with metal lugs on hard surfaced highways. For example, note the last sentence of Section 304.250, above quoted, which permits tractors with "V" shaped, diagonal or other cleats arranged in such manner as to be continuously in contact with the road surface.

The statutory prohibition operates against vehicles equipped with tires which have both of the following characteristics:

- (1) Tires made of metal; and
- (2) Tires having projections as described in Section 304.250.

As we understand them, the tires you are inquiring about are pneumatic tires made of rubber, nylon, or some similar synthetic material, which fit onto a metal wheel. In fact, the only significant difference between the tires you describe and the tires almost universally used on all automobiles, is that the tires you describe have inserts made of metal or carbide which are imbedded in the tread of the tire. These inserts are about  $\frac{1}{2}$ -inch in length and are approximately  $\frac{1}{8}$ -inch in diameter, with the exception of the flat head or shoulder presumably designed to prevent the insert from punching through the tire or ejecting at high speed. This flat head or shoulder is approximately  $\frac{3}{8}$ -inch in diameter. These inserts are so spaced as to constitute only a fraction of that portion of the tire's surface which comes into contact with the road. Likewise, the inserts constitute only a fraction of the material of which the tire is made. Based on the sample tires we have observed, there are 72 to 150 inserts per tire, depending upon the size of the tire and the manufacturer's design. The inserts project appreciably beyond the tread, or traffic surface of the tire, thus being a projection of metal within the contemplation of Section 304.250.

It is true that the metal studs are so arranged that metal is always in contact with the road surface. From this premise it may be argued that this constitutes a "metal tired vehicle."

Senator Jasper Brancato

This would seem to be a rather strained construction of the language used in the statute. It does not seem to give the words used in the statute their usual and commonly understood meaning.

Our investigation of the problem indicates that there is a conflict of opinion as to whether the metal studs do or do not damage the highways. If, however, we concede that such studs do cause damage to highways, this does not authorize a strained construction of this statute in order to prohibit their use. This presents a matter for possible corrective action by the legislature and this office should not attempt such action by strained or distorted interpretation.

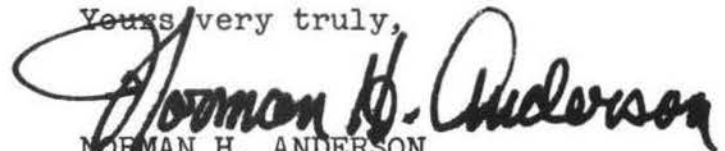
The tire consists predominantly of rubber, nylon or some similar synthetic. The inclusion of a small percentage of metal in the form of inserts is not sufficient to make the tire a metal tire or a metal tired vehicle; therefore, a motor vehicle using the tires described above would not be a "metal tired vehicle" within the meaning of Section 304.250, RSMo 1959.

#### CONCLUSION

Therefore, it is the opinion of this office that pneumatic tires made of rubber, nylon, or some similar synthetic, studded with metal inserts as described herein, are not prohibited by statute in the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Gordon Siddens.

Yours very truly,

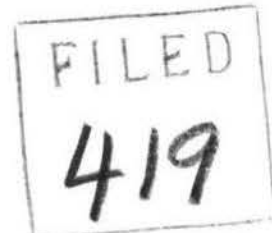
  
NORMAN H. ANDERSON  
Attorney General

December 29, 1965

Answered By Letter  
(Ashby)

Opinion No. 419

Honorable Earl R. Blackwell  
Senator of 22nd District of Missouri  
Hillsboro, Missouri



Dear Senator Blackwell:

This letter is in response to your request for an opinion defining the authority, if any, of the Director of the Jefferson County Health Department, to prepare regulations on rabies control under Section 322.100 RSMo and submit them to the county court.

Jefferson County came within the ambit of Sections 322.090 through 322.130 RSMo by reason of an amendment to 322.120 RSMo Cum. Supp. 1965. Sections 322.090 and 322.100, authorize the county court to issue regulations on rabies control and refer therein to the "County Health Commissioner". Section 322.100, imposes the duties upon this officer to prepare the proposed regulations; hold hearings thereon and submit his regulations to the county court.

Dr. Carl Rice of Hillsboro, advised a member of this office that he is the Director of the Jefferson County Health Center, and serves as the "County Health Officer". (See Section 192.260 and 205.100 RSMo).

Section 205.100 RSMo reads as follows:

"The county court or courts shall annually at their February meeting, appoint the director of the public health center as county health officer and such county health officer shall exercise all of the rights and perform all of the duties pertaining to that office as set forward under the health laws of the state and rules



Honorable Earl. R. Blackwell

and regulations of the division of health  
of the department of public health and  
welfare."

(Underscoring Added)

Attention is directed to the broad scope of responsibility indicated by the underscored part of the above statute.

Statutes relating to the same subject matter must be considered together, even though, the statutes are found in different chapters and were enacted at different times. (State ex rel Smithco Transport Co. v. Public Service Commission 316 S.W. 2d 6, 1.c. 13). The court in this case cited 82 C.J.S. "Statutes" Section 366, Page 801.

In State ex rel Peck Company v. Brown, 105 S.W. 2d 909, 1.c. 911-912, it is stated:

"In construing statutes in pari materia, endeavor should be made, by tracing history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible the statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms, nor will it be presumed that the Legislature intended to leave on the statute books two contradictory enactments." 16 Cyc. 1147. We approved the above excerpt in State ex rel Columbia National Bank v. Davis, 314 Mo. 373, 284 S.W. 464."

Honorable Earl. R. Blackwell

Section 205.100 RSMo 1959, was originally enacted in 1945, (L. 1945, p. 969 House Bill No. 280 Section 7) and used the term "deputy health commissioner." The 1949 revision changed the designation of this position to "county health officer."

Section 192.260 has its genesis, according to Vernon's Annotated Missouri Statutes, in Laws of Missouri 1883 at p. 95, creating a state board of health, and in RSMo 1889, as Chapter 79. The county board of health composed of the county judges and a physician first appears in the revised statutes as Section 7529a, RSMo 1906. The RSMo perpetuate the state board of health and the county boards of health until 1919 where in L. 1919 p. 372, the term "deputy state commissioners" first appears. This term was also found in Section 5782 RSMo 1919, and successive revised statutes. According to the House and Senate Journals, 65 General Assembly, Volume III, Report on the Revision of Statutes, 1949, Missouri, at p. 544, Section 9855, RSMo 1939, abolished the office of state board of health and its powers and duties vested in the department of public health and welfare (L. 1945, p. 945, Section 13, 22 and 23). Where the term "state board of health" is used, the term "division of health" was to be substituted and understood. By the 1949 revision act (Senate Bill No. 1051), the position of deputy state commissioner of health was redesignated as the county health officer since the office of state commissioner of health no longer existed according to the comment made by the revisor of statutes found in 12 VAMS, p. 35-36, on Section 192.260 RSMo.

The term "county health commissioner" appears only in Sections 322.090 and 322.100 RSMo 1959, and remains on the statutes as it was originally enacted in 1943 (L. 1943, p. 327, Section 243). These sections were not modified or changed during the 1949 revision.

The statutes discussed above are considered to be in pari materia and even though amended, we feel they should be construed and harmonized together. As originally enacted and with the evolution of the law on these offices, the functions of the county health commissioner under Section 322.090 and 322.100, were performed by deputy health commissioner before 1949, and have been performed by county health officers since 1949, when

Honorable Earl R. Blackwell

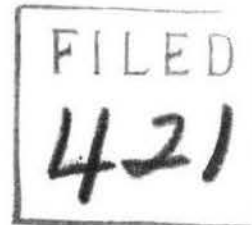
the statutes were amended so as to provide for the appointment of county health officers instead of county health commissioners. We deem the terms, "deputy health commissioner" and "county health commissioner" to have identical functions under Sections 322.090 through 322.190. This interpretation equates the offices of the county health officer and county health commissioner so far as the duties imposed under Section 322.090 through 322.190, RSMo 1959, are concerned.

We thus conclude the office of County Health Officer of Jefferson County and County Health Commissioner as the term is applied to Jefferson County, are one and the same officer when executing those functions and duties imposed by Sections 322.090 through 322.190, RSMo 1959 (as amended).

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

December 30, 1965



Honorable William Fickle  
Representative of Platte County  
Missouri House of Representatives  
7406 Tomahawk Road  
Parkville, Missouri

Dear Mr. Fickle:

This letter is in response to a request for an opinion on the following questions (as restated by this office):

1. Where the director of a public water supply district moves his residence from one subdistrict to another, does he forfeit his office under Section 247.040 (5) RSMo 1959, and, if so, at what time does he cease to be a member of the board?

2. What constitutes an "absence or disability of the president" under Section 247.100-143, RSMo 1959, that will allow the vice-president to countersign the district warrants?

In answering your first question we must assume that the director has in fact made a valid change of residence with an intent to change permanently his residence. In other words, it was not a temporary change of address. This matter of residence is a question of fact and intent. Resolution of this question is not without considerable difficulty under all the facts and circumstances (See State ex inf Reardon v. Mueller, 398 SW 2d 53) and can usually only be determined by a Court having jurisdiction of the proceedings. (See opinion attached No. 27, dated November 8, 1948, to Clarence Evans).

Section 247.040 (5), supra, relating to residence of members of the Board of Directors of the District reads in part as follows:

"\* \* \*The decree of incorporation shall also divide the district into five subdistricts and shall fix their boundary lines, all of which subdistricts shall have approximately the same area and shall be numbered. The decree shall further contain an appointment of one resident

Honorable William Fickle

freeholder from each of such subdistricts, to constitute the first board of directors of the district. No two members of such board so appointed or hereafter elected or appointed shall reside in the same sub-district. \* \* \*

In 67 C.J.S. "Officer" §15, at page 128, we find the following statement:

"When a requirement of residence is imposed, however, it is mandatory and its validity has been upheld." (See cases cited)

In 67 C. J. S. supra, §50 page 209 it states:

"Where an incumbent of a public office who, to be qualified for the office, must reside in the particular district moves out of the district with intention of remaining permanently outside it, the office which he holds is regarded as vacant \* \* \*."

See also McQuillin "Municipal Corporations", Volume 3, #12.65 at page 284.

While we have found no cases involving a water district, we believe the case of State ex rel Johnston v. Donworth, 127 Mo. App. 377, 105 SW 1055, to be relevant and persuasive. This was an action to determine the qualification of an elected alderman who later moved into another ward. While it involved the construction of the statutes relative to a city of the fourth class, we think the reasoning valid in this case. The Court said:

"\* \* \*Section 5911 also prescribes the qualifications of aldermen in such cities and requires them to be twenty-one years of age, citizens of the United States, inhabitants of the city for one year preceding the election and residents of the ward from which they are elected. No doubt if a person was elected alderman without those qualifications, he might be ousted from office, and thus far the contention of the defendant's counsel, that the section prescribes who shall be eligible for

Honorable William Fickle

election, is sound. But the section goes further, and, in our opinion, requires a continuance of those qualifications to entitle one elected alderman to remain in office. If an incumbent should cease to be a citizen of the United States, or a resident of the city, it is conceded he would lose his right to hold the office. The requirement that he shall be a resident of the ward from which he is elected is no less imperative, and we think change of residence to another ward disqualified him to represent the ward by which he was chosen and forfeits his right to the office. It is argued for defendant that the phrase 'no person shall be an alderman,' means no one shall become an alderman unless he has the prescribed qualifications; the word 'be' having in this connection the sense of 'become'. But this is to unduly narrow its meaning. It not only forbids a person to become an alderman unless he is eligible under the section, but also forbids him to be one. That is, to remain one if he becomes disqualified. \* \* \*."  
(Emphasis Added)

\* \* \* \* \*

"Several incongruities arise if we accept the reasoning of defendant's counsel. If a person elected alderman is a resident of the ward on the day of the election, but immediately moves into another ward, he could serve his two years' term. And if all the aldermen of a city should happen to move into one ward during their respective terms of office, they would still constitute the board of aldermen. Such contingencies are opposed to the policy of the statute, which policy is to require aldermen to be residents of the ward, not only when elected but during their terms of office. \* \* \*."

We conclude that, when a director moves his residence from a water subdistrict from which he was originally appointed or elected into another subdistrict with intent to permanently reside therein the courts may hold that the office of director is forfeited. The court will at that time rule on the date the



Honorable William Fickle

office was vacated.

We regret we cannot answer your second inquiry because the answer depends on specific facts and circumstances without which we could only speculate and hypothesize.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General

RCA/ms

Enclosure: Op. #29, 11/8/48

PROSECUTING ATTORNEYS: The compensation provided for by  
COUNTY OFFICERS: Senate Bill No. 355 enacted by the  
SALARIES: 73rd General Assembly applies during  
BUDGET LAW: the present term of office.

OPINION NO. 433

December 2, 1965

Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri

FILED  
433

Dear Mr. Holman:

This is in answer to your request for an opinion on the following question:

"Are Prosecuting Attorneys of third and fourth class counties entitled to receive, on and after October 13, 1965, the additional compensation as set forth in Senate Bill 355 enacted by the Seventy-Third General Assembly or does the provision of Section 13, Article VII of the Constitution prohibit said increase during the present term of such officer?"

Senate Bill No. 355 was enacted by the 73rd General Assembly as Section 56.291, V.A.M.S. September 1965 Pamphlet, and reads in part as follows:

"The prosecuting attorney in counties of the third and fourth class, in addition to his other duties provided by law, shall submit to the attorney general of the state of Missouri, a written brief summarizing the facts and law of the lower court proceedings had in all criminal cases appealed to the supreme court from the county of his jurisdiction and as compensation shall receive in addition to the compensation provided by law, \* \* \* to be paid monthly in the same manner as the prosecuting attorney's compensation. \* \* \*"

Section 13 of Article VII of the Missouri Constitution reads as follows:

Honorable Haskell Holman

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

In Little River Drainage District v. Lassater, 325 Mo. 493, 29 S.W.2d 716, 719, the Missouri Supreme Court said this:

"[6] The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. \* \* \*"

It is our opinion that Senate Bill No. 355 imposes on prosecuting attorneys of third and fourth class counties additional duties not ordinarily incident to their office. Therefore, the compensation provided is due during the present term of such prosecutors.

Senate Bill No. 355 also provides for the yearly compensation to be paid monthly. Enclosed is a copy of Attorney General Opinion, dated June 5, 1953, to the Honorable Charles E. Murrell, Jr., which this office still adheres to. Following the Murrell opinion the compensation provided for in Senate Bill No. 355 is to be prorated each month on a yearly basis so that each month 1/12th of the compensation is to be paid. For 1965 compensation would be due for November and December and the proportionate part of October dating from the thirteenth.

Also enclosed is a copy of Attorney General Opinion, dated July 18, 1949, to the Honorable Joe C. Welborn, holding that such compensation is automatically included within the budget of third and fourth class counties.

#### CONCLUSION

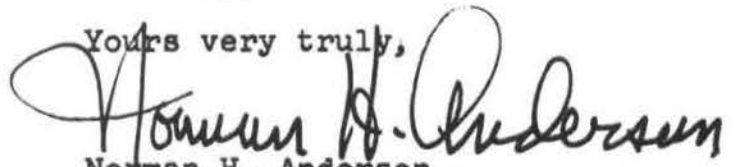
It is the opinion of this office that the compensation provided for by Senate Bill No. 355 enacted by the 73rd

Honorable Haskell Holman

General Assembly applies during the present term of office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

  
Norman H. Anderson  
Attorney General

Enclosures (opinions): 6-5-53, to Murrell  
No. 95, to Welborn, 7-18-49

MOTOR VEHICLES:  
MOTOR VEHICLE REGISTRATION:  
LICENSES:  
STATUTES:  
CITIES, TOWNS AND VILLAGES:

Vehicles leased by a city and used by the police department of the city must be registered and licensed upon application of the person, firm, corporation or association holding legal title to such vehicles unless such vehicles are the subject of an agreement of lease with the right of purchase upon performance of conditions stated in an agreement for lease.

OPINION NO. 444  
December 14, 1965

Honorable J. R. Fritz  
Prosecuting Attorney for Pettis County  
Sedalia, Missouri



Dear Mr. Fritz:

This letter is in response to your request for an opinion of this office concerning the licensing of motor vehicles used by the police department of a city of the third class when such vehicles are leased by the city, under the provisions of Section 301.260 (2) RSMo. You inquire as to whether under these circumstances the city has sufficient "ownership" to operate such vehicles within the city limits without a license if such vehicle is properly lettered under the provisions of the statute; and further, what licensing requirements must be satisfied in the event such vehicle is operated outside the limits of such city.

Section 301.020 RSMo states in part:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose . . . :"

The motor vehicle registration law applies to owners. Section 301.010 RSMo defines the term "owner" to "include any person, firm, corporation or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to

Honorable J. R. Fritz

possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law."

Section 301.260 (2) RSMo exempts certain vehicles from the operation of the registering and licensing requirements of Section 301, which vehicles are "owned" by a city. The term "owned" used in said Section 301.260 (2) connotes the same elements of ownership as does the word "owner" in said Section 301.010, by application of the presumption in law that identical words used in different parts of the same statute are intended to have the same meaning throughout the act. 82 C.J.S. Statutes Section 316 P. 553. The case of Morgan v. Jewell Const. Co., Mo. App., 91 S.W. 2d 638 quotes with approval the following language from In re Dees, 50 Cal. App. 11, 194 Pac. 717:

"It is fundamental that where one form of expression is used throughout a statute dealing with a number of things it will ordinarily be adjudged to have been used to achieve the same purpose."

Vehicles leased by a city are not owned by the city except in case of a lease with the right of purchase as set out in the above quoted part of Section 301.010. The persons, firms, corporations or associations holding legal title to such vehicles are required to apply for registration of the vehicles pursuant to said Section 301.020 unless the vehicles are subject to a lease with the right of purchase upon performance of the conditions stated in the agreement.


We assume from your opinion request that the lease in question does not provide for the right of purchase by the lessee upon performance of the conditions in the lease agreement. Since the vehicles described in your inquiry must be licensed, there is no need to consider the last part of your inquiry concerning the licensing of such vehicles which may be operated outside of the city limits.

#### CONCLUSION

It is the opinion of the Attorney General that vehicles leased by a city and used by the police department of the city must be registered and licensed upon application of the person, firm, corporation or association holding legal title to such vehicles, unless such vehicles are the subject of an agreement of lease with the right of purchase upon performance of conditions stated in an agreement for lease.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donald L. Randolph.

Very truly yours,

  
NORMAN H. ANDERSON  
Attorney General



CONSTITUTIONAL AMENDMENT: Ballot Title for Conference Committee  
Substitute for House Substitute No. 4  
for House Committee Substitute for  
House Joint Resolution No. 1 -  
First Extra Session 73rd General Assembly

November 22, 1965

Honorable James C. Kirkpatrick  
Secretary of State  
Capitol Building  
Jefferson City, Missouri



Re: Conference Committee Substitute for House Substitute  
No. 4 for House Committee Substitute for House Joint  
Resolution No. 1 - First Extra Session 73rd General  
Assembly

Dear Mr. Kirkpatrick:

Pursuant to your request of November 22, 1965, and pursuant  
to the directive found in Section 125.030, RSMo 1959, I submit  
the following ballot title in relation to the above subject:

Provides for 163 representatives.  
Representative and Senatorial Districts  
created by bipartisan commissions. If  
Commissions fail to redistrict then by  
Missouri Supreme Court Commissioners.

Yours very truly,

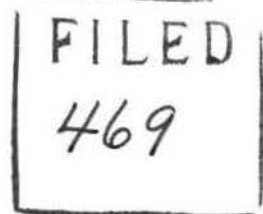
NORMAN H. ANDERSON  
Attorney General

JGS/ms

March 29, 1965

OPINION NO. 469

Mr. Sargent Shriver, Director  
Office of Economic Opportunity  
Executive Office of the President  
Washington, D. C. 20506



Attention: Miss Deirdre Henderson

Dear Mr. Shriver:

The Office of the Governor of the State of Missouri has requested the Attorney General to give an opinion as to the legality of contractual relationships between the Office of Economic Opportunity, as established by the Economic Opportunity Act of 1964 (Public Law 88-452), and the Office of the Governor of the State of Missouri.

Section 209 of the Economic Opportunity Act of 1964 provides for participation of state agencies. Section 209 (b) reads as follows:

"The Director is authorized to make grants to, or to contract with, appropriate state agencies for the payment of expenses of such agencies and provide technical assistance to communities in developing, conducting, and administering community action programs."

By the terms of the guidelines proposed by the Office of Economic Opportunity on November 6, 1964 entitled "Guide to Programs or Grants to States for Providing Technical Assistance to Communities". and in particular under Section b thereof, the Governor of each state was guided to determine the appropriate state agency to apply for technical assistance funds and to carry out the state's program of technical assistance.

In the State of Missouri former Governor John Dalton designated his Administrative Assistant to be the Director. On September 30, 1964, Missouri's Application for Technical Assistance Grant, pursuant to Section 209 (b) of the Economic Opportunity Act of 1964 was forwarded. On November 18, 1964, this application was approved by the Office of Economic Opportunity. On March 5, 1965, Governor Warren E. Hearnes designated his Administrative Assistant for Urban Affairs to be the appropriate state agency to carry out the state's program of technical assistance. This agency has been termed Missouri Office of Economic Opportunity by the Governor which is a fictitious name used to describe the program within the Office of the Governor.

Article IV, Section 1, of the Constitution of Missouri which pertains to the executive powers of the Governor states:

"The Supreme Executive Power shall be vested in the Governor."

It is under this power that the Governor of Missouri is empowered to contract with the federal government. In *Shepard Engineering Company v. U.S.*, 289 F.2d 681, the court stated that in the absence of constitutional inhibition, the sovereign can make such contract as it pleases and no one can object. There are no constitutional or statutory restrictions upon the Governor of Missouri to contract with the federal government.

More fully, therefore, it is our opinion that the Office of the Governor of the State of Missouri possesses the legal capacity to enter into contractual relationships with the Office of Economic Opportunity, as established under the Economic Opportunity Act of 1964 (Public Law 88-452).

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

STATE TREASURER:  
STATE DEPOSITORIES:  
BANKS:  
INTEREST:  
NOTICE:

The state depository contract provides for time deposits, open account for which the state is paid interest on an escalating scale. Banks cannot return deposits unless the banks terminate the contract on 30 days written notice. The 30 days begin to run when the notice is received by the State Treasurer.

December 21, 1965

OPINION NO. 471

Honorable M. E. Morris  
Treasurer for the State of Missouri  
Jefferson City, Missouri



Dear Mr. Morris:

This opinion is in response to your request for advice arising from certain state depositories' contention that they have the right to return their state deposits to the state treasurer placed with them under contracts on "time deposits, open accounts" without payment of interest at the advanced rate of interest prescribed recently by the Federal Reserve Board.

In the interests of better understanding, a brief explanation of the banking systems so far as it is pertinent to these issues is required. There are two parallel systems of banking practices, each operating under separate federal rules and regulations. There is the Federal Reserve system composed of "member banks" that operate under rules and regulations promulgated by the Board of Governors of the Federal Reserve Board. The other group are "nonmember" banks operating under rules and regulations promulgated by the Federal Deposit Insurance Corporation, for example, state banks insured by the Federal Deposit Insurance Corporation. There is a third type of banks which are state banks and are not members of Federal Deposit Insurance Corporation.

A brief review of the pertinent facts for the record is also desirable. Pursuant to Section 15, Article IV, Constitution of Missouri 1945, and Chapter 30, RSMo as amended, the state treasurer has entered into contracts with certain banks for the safe-keeping of state funds. Some of the money has been placed on "time deposits, open account" drawing interest as provided in Section 30.260 (3) RSMo 1959, for the benefit of the state which provides as follows:

"The rate of interest payable by all banking institutions on time deposits of state moneys shall be the maximum rate of interest which by federal law or regulation a bank which is a member of the Federal Reserve System may from time to time pay on a time deposit that is payable upon written notice of less than ninety days, and the method of computing interest on time deposits of state moneys shall be uniform among

Honorable M. E. Morris

all depositaries. All time deposits of state moneys shall be subject to withdrawal by the state treasurer upon the expiration of notice given by him not less than thirty days in advance of withdrawal."

Deposits are made pursuant to a written contract which is attached hereto. Prior to December 6, 1965, the maximum rate of interest payable on time deposits open account by Federal Reserve member banks (or "nonmember" banks that were under the Federal Deposit Insurance Corporation regulations) was 4 percent. This was because of the provisions of Federal Reserve regulation Section 217.6 of Regulation Q, effective December 6, 1965, for Federal Reserve member banks, the rates were increased to  $5\frac{1}{2}$  percent pursuant to an amendment to Section 217.6 (supra). On December 7, 1965, the Federal Deposit Insurance Corporation increased the maximum interest rate payable by their banks to  $5\frac{1}{2}$  percent pursuant to an amendment to Section 329, Federal Deposit Insurance Corporation rules and regulations.

On November 24, 1965, the State Treasurer gave notice to the depository banks that the State would withdraw 25 percent of the respective balances on deposit with such banks effective January 1, 1966.

After the increase of maximum interest rate pursuant to the change in the Federal Reserve Regulation and the operation of the provisions of Section 30.260 RSMo 1959 the banks have tendered to the State Treasurer the amounts of the state deposits with accrued interest payable at the rate of 4 percent until December 6, 1965, and  $5\frac{1}{2}$  percent from December 6, 1965 to date of tender stating they are not "cancelling" the depository contract but they are returning the money. As to those sums to be withdrawn under notice given by the State on November 24, 1965, the banks are offering only 4 percent interest until payment contending such sums are not time deposits covered by the amendment on interest rates stating that the maturity date is December 31, which is less than 30 days from December 6, 1965, and therefore cannot be classified as "a time deposit, open account."

Section 30.250, RSMo 1959, in pertinent parts, reads as follows:

"1. The state treasurer shall enter into a written contract in quintuplicate with each depository setting forth the conditions and terms upon which the moneys of the state are deposited therewith and containing among its provisions and conditions the following:

- (1) The amount of the moneys of the state to be entrusted to each depository;
- (2) With respect to demand deposits, the time such contract shall continue with



the right reserved to each the state treasurer and the depository to terminate the contract at any time upon giving thirty days' notice to the other party of his or its intention to do so;

- (3) With respect to time deposits, the conditions as to time and notice which need be given in regard to withdrawals and the rate of interest which the depository shall be obligated to pay;
- (4) Provisions requiring that the depository shall (a) safely keep said deposits, (b) pay demand deposits on the state treasurer's written demand therefor, and (c) pay time deposits only in accordance with the contract with the depository."

The terms and conditions of this statute are a part of the contract between the State and the bank.

The "State Depository Contract" referred to in the statute is in standard form with the banks and the State Treasurer is the First Party and the Bank is the Second Party. The 3rd paragraph of the contract contains the following language:

"It is hereby agreed that First Party will deposit with Second Party such sums of the state moneys of the State of Missouri as may be designated by the State Treasurer, not to exceed a total of \$\_\_\_\_\_. Moneys so deposited with Second Party shall be held by Second Party as a time deposit, open account, and shall be subject to withdrawal by First Party upon the expiration of the period of notice of intention to withdraw which shall be given by First Party to Second Party in writing not less than thirty (30) days in advance of withdrawal."

✓ A "time deposit, open account," as used in the Federal Reserve System is defined by Section 217.1 (d), Regulation Q of the Federal Reserve Board as follows:

"The term 'time deposit, open account' means a deposit, other than a 'time certificate of deposit' or a 'savings deposit', with respect to which there is in force a written contract with the depositor that neither the whole nor any part of such deposit may be withdrawn, by check or otherwise, prior to the date of maturity, which shall be not less than 30 days after the date of the deposit, or prior to



the expiration of the period of notice which must be given by the depositor in writing not less than 30 days in advance of withdrawal."

A "time deposit, open account" as defined for use of non-member banks that are under Federal Deposit Insurance Corporation regulations is found in Section 329.1 (d) Title 12, C.F.R. p 247 and is substantially identical to that employed for members of the Federal Reserve System.

Pursuant to Section 30.260 (3), RSMo 1959, the Contract contains an escalation clause respecting the interest rate that such state deposits shall bear as follows:

"Second Party agrees to pay to First Party interest on moneys so deposited with Second Party at the maximum rate which, by federal law or regulation, a bank which is a member of the Federal Reserve System is permitted, from time to time, to pay on such time deposits."

A comment at this time on the validity of a contract provision providing for escalation of interest rates appears appropriate. The general rule covering escalating interest rates in a contract is aptly stated in 47 CJS "Interest" Section 33(b), p. 44, as follows:

"The parties may enter into a contract by which the rate of interest to be paid shall change whenever the legal rate changes."

See also 30 Am Jur "Interests" Section 28, p. 25; Wychoff v. Wychoff (NJ 1888) 13 at 662; Bankers Bond Co. v. Buckingham (Ky. 1936) 97 S.W.2d 596.

The fact that there was an effective change of interest rate on December 6, 1965, for Federal Reserve banks does not change the nature of the deposit or the obligations of the parties in our opinion. It does not constitute a novation as there has been no consent by the state (Hutcheson & Co. v. Providence-Washington Insurance Company, 341 S.W.2d 142, 146).

The contract contains the following provision respecting termination:

"Each party reserves the right to terminate this contract at any time on giving thirty (30) days' written notice to the other party of its intention to do so; and this contract shall continue in effect until so terminated."

Considering the principles set out above, we believe the obligations of the parties were fully spelled out in the contract, with the change of interest rates increasing the sum payable by the debtor banks for use of state money. Simply put, we believe the banks agreed to accept a sum certain under the contract for the duration of the contract or until terminated on 30 days written notice as provided by the contract. They agreed to pay therefor an interest rate on an escalating scale according to the maximum legal rate set by the Federal Reserve Board.

The first question for consideration is the contention of the several banks that a depository bank may return the amount of deposit to the state at the election of the bank.

With the permission of the author, we quote from a letter dated December 9, 1965, written by the General Counsel for the Federal Reserve Bank at St. Louis, Missouri, which reads as follows:

'A bank's obligations under the Federal banking laws with regard to payment of time deposits are governed, for banks which are members of the Federal Reserve System, by 12 U.S.C.A. §371 (b) which provides:

'The Board of Governors of the Federal Reserve System shall from time to time limit by regulation the rate of interest which may be paid by member banks on time and savings deposits . . . No member bank shall pay any time deposit before its maturity except upon such conditions and in accordance with such rules and regulations as may be prescribed by the said Board . . .'

"(Similar provisions with regard to Federally insured banks which do not belong to the Federal Reserve System may be found at 12 U.S.C.A. §1828 (g).)

"By authority of 12 U.S.C.A. §461, the Board of Governors of the Federal Reserve System is empowered to define (among other terms) 'time deposit,' and it has done so in Section 217.1 (b) of Regulation Q as including a 'time deposit, open account.' The latter term is further defined in Section 217.1 (d) of the Regulation as ' . . . a deposit, . . . with respect to which there is in force a written contract with the depositor that neither the whole nor any part of such deposit may be withdrawn . . . prior to the expiration of the period of notice which must be

given by the depositor in writing not less than 30 days in advance of withdrawal.' The terms of the State Depository Contract make it clear that these deposits must be classified by a member bank as a 'time deposit, open account.'

"The possibility of the repayment of a 'time deposit, open account' before maturity is governed by Sections 217.4 (c) and (d) which provide:

'(c) . . . No member bank shall pay any time deposit, with respect to which notice is required to be given a certain specified period before any withdrawal is made, until such required notice has been given and the specified period thereafter has expired, except as provided in paragraph (d) of this section.

'(d) . . . In an emergency where it is necessary to prevent great hardship to the depositor, a member bank may pay before maturity a time deposit or the portion thereof necessary to meet such emergency, Provided, That before making such payment the depositor shall sign an application describing fully the circumstances constituting the emergency which is deemed to justify the payment of the deposit before maturity, which application shall be approved by an officer of the bank who shall certify that, to the best of his knowledge and belief, the statements in the application are true. Such application there shall be retained in the bank's files and made available to the examiners authorized to examine the bank. Where a time deposit is paid before maturity the depositor shall forfeit accrued and unpaid interest for a period of not less than three months on the amount withdrawn if an amount equal to the amount withdrawn has been on deposit three months or longer, and shall forfeit all accrued and unpaid interest on the amount withdrawn if an amount equal to the amount withdrawn has been on deposit less than three months . . . .'

"The foregoing makes provision for payment of a time deposit prior to maturity only upon the application of the depositor. However, it cannot be presumed that the absence of any counterpart provision for prepayment at the initiative of the bank is accidental. On the contrary, such absence may well reflect a conclusion that if the best interests of the bank and other depositors are to be protected, it is necessary to remove any possibility that a bank could waive the requirements of

notice and repay before maturity. Otherwise, for example, a bank might be subject to considerable pressures from an important customer to acquiesce in an early repayment.

"In any event, however, there is no provision under Regulation Q for advance payment of a time deposit upon the initiative of the depository bank, and, accordingly, it would be my opinion that a member bank which does so violates the Regulation and 12 U.S.C.A. §371 (b)."

Section 329.4 Title 12 C.F.R. p. 250-251 (which is applicable to "nonmember" state banks under Federal Deposit Insurance Corporation rules) reads as follows:

"(a) Time deposits payable on a specified date. No insured nonmember bank shall pay any time deposit, which is payable on a specified date, before such specified date, except as provided in paragraph (d) of this section.

"(b) Time deposits payable after a specified period. No insured nonmember bank shall pay any time deposit, which is payable at the expiration of a specified period, before such period has expired, except as provided in paragraph (d) of this section.

"(c) Time deposits payable after a specified notice. No insured nonmember bank shall pay any time deposit, with respect to which notice is required to be given a specified period before any withdrawal is made, until such required notice has been given and the specified period thereafter has expired, except as provided in paragraph (d) of this section."

Section 1828 (g) Title 12 U.S.C.A. p. 382 reads as follows:

". . . Such regulations shall prohibit any insured nonmember bank from paying any time deposit before its maturity except upon such conditions and in accordance with such rules and regulations as may be prescribed by the Board of Directors, and from waiving any requirement of notice before payment of any savings deposit except as to all savings deposits having the same requirement . . ."

Based on the above authorities we conclude that a bank (whether a member bank of the Federal Reserve System or nonmember bank under Federal Deposit Insurance Corporation) may not lawfully make an advance payment of a time deposit upon the initiative of the depository bank (absent termination of the contract on 30 days written notice as provided in the contract).

The next question for determination is the amount of interest that the depository banks are required to pay after December 6, 1965, on those sums of monies for which notice of withdrawal has been given by the state treasurer to the depository banks on November 24, 1965.

As to that portion of the deposits on which notice has been given, we quote subparagraph Section 217.3 (e) of Regulation Q of the Federal Reserve Regulations:

"A deposit which was a time deposit at the date of deposit continues to be such until maturity although it has become payable within 30 days, and interest at a rate not exceeding that prescribed pursuant to the provisions of paragraph (a) of this section may be paid until maturity upon such deposit. A time deposit or a savings deposit with respect to which notice of withdrawal has been given continues to be such until the expiration of the period of such notice, and interest may be paid upon such deposit until the expiration of the period of such notice at a rate not exceeding that prescribed pursuant to the provisions of paragraph (a) of this section." (Emphasis Added)

Section 329.3 (d) Title 12, C.F.R. applicable to nonmember state banks under Federal Deposit Insurance Corporation regulations reads as follows:

"(d) Continuance of time deposit status. A deposit which was a time deposit at the date of deposit continues to be such until maturity, although it has become payable within thirty (30) days, and interest at a rate not exceeding that prescribed pursuant to the provisions of paragraph (a) of this section may be paid until maturity upon such deposit. A time deposit or a savings deposit, with respect to which notice of withdrawal has been given, continues to be such until the expiration of the period of such notice, and interest may be paid upon such deposit until the expiration of the period of such notice, at a rate not exceeding that prescribed pursuant to the provisions of paragraph (a) of this section. Interest at a rate not exceeding



that prescribed pursuant to the provisions of paragraph (a) of this section. Interest at a rate not exceeding that prescribed pursuant to the provisions of paragraph (a) of this section may be paid upon savings deposits with respect to which notice of intended withdrawal has not actually been required or given. No interest shall be paid by an insured nonmember bank on any amount which by the terms of any certificate or other contract or agreement, or otherwise, the bank may be required to pay within thirty (30) days from the date on which such amount is deposited in such bank, except as to savings deposits with respect to which the bank consistently continues to adhere to a practice existing prior to January 23, 1936, of requiring notice of at least fifteen (15) days before permitting withdrawal."

These regulations provide that the bank may continue to pay interest on the time deposit at the applicable rate until the expiration of the period provided in the notice of withdrawal.

We conclude therefore that the depository member and "non-member" banks are required to pay on all moneys on deposit at the rate of 4 percent interest until December 6, 1965, and thereafter at the rate of 5 1/2 percent until such moneys in the time deposit, open account have been withdrawn from the depository member banks by the state.

The next question is one of notice, i.e., does the 30 day period of written notice to terminate start to run under the contract when it is mailed (if so) or when such notice is received by the state treasurer?

It is noted the contract does not specify the means or manner in which the notice shall be communicated other than require that it be "30 days written notice". The court, in *Schott v. Continental Auto Ins. Underwriters*, 31 S.W.2d 7, 13, made these general observations about notice, which we feel are pertinent here and we set them out:

"According to a general rule, where notice is required to be given by statute, or contract, and the manner of serving the notice is not prescribed, personal service is intended. There is also an auxiliary rule, likewise general in application, that has the support of authority: 'In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected until



the notice comes into the hands of the one to be served, and he acquires knowledge of its contents.' 46 C. J. 559. If the language of the applicable provision of the policy alone be considered, it must be held, in consonance with the rules just mentioned, either that personal service of notice of loss on the insurer at its home office in Springfield, Ill., is required, or, if the general rule may be sufficiently relaxed to admit of service by mail, that such service is not effected until the notice is actually received and read by a duly authorized agent of the insurer at its home office.

[7,8] But the rules just referred to are merely rules of construction--at least when applied to contracts. They are not controlling, therefore, where it is manifest from the instrument as a whole that the intention of the parties would be thwarted, rather than given effect, by their application. A more important rule in the construction of contracts is that the interpretation must be upon the entire instrument, and not merely upon disjointed or particular parts of it. 'The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause.' 6 R.C.L. 837, §227."

Applying these general rules to this contract, it is intended that service of notice must be had upon the state treasurer, or his office if the depository banks desire to terminate the contract. Thus, if notice were mailed to the state treasurer, the 30 day period for termination of the contract would begin to run from the date such notice of termination was, in fact, delivered to the office of the state treasurer. We conclude therefore that the 30 day written notice by depository banks to terminate the contract begins to run when such notice is delivered to the office of the state treasurer in Jefferson City, Missouri, or is personally served on him elsewhere as the case may be.

The State Treasurer does not have authority to settle or adjust the claims of the banks except as provided for by the depository contract pursuant to the law made and provided for. A waiver or acceptance of oral notice to terminate is unauthorized. As long as the contract is in effect the banks have agreed to accept an amount up to a sum certain and to pay thereon, interest at the rate specified under the terms of the contract, nothing less can be accepted.

#### CONCLUSION

It is the opinion of this office that:

1. Depository banks under their contracts with the state may not return deposits of the state at their election while the contract

Honorable M. E. Morris

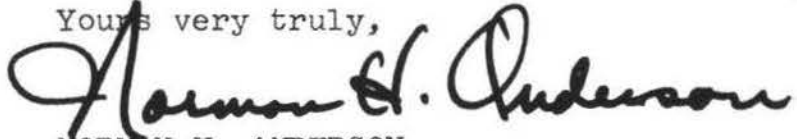
is in force, provided such deposits do not exceed the total amount of deposit stipulated in the contract.

2. Moneys on deposit for which notices of withdrawal have been given to the depository banks retain their character as "time deposits, open account" drawing the same rate of interest as the balance of the moneys on deposit as provided by the contract, i.e., at the maximum rate which, by federal law or regulation, a bank which is a member of the Federal Reserve System is **permitted**, from time to time, to pay on such time deposits even though the rate of interest may escalate subsequent to the notice of withdrawal.

3. The 30 day written notice of termination of the State Depository Contract commences to run upon delivery to the State Treasurer of such notice.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Richard C. Ashby.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson". The signature is fluid and cursive, with the first name "Norman" being the most prominent part.

NORMAN H. ANDERSON  
Attorney General

December 16, 1965



Honorable Thomas David  
Director of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. David:

Harry W. Smith has contacted this office and informed us that he is presently drawing an annuity under the State Employees' Retirement System; that he is 61 years of age and that he is contemplating accepting an appointment in your department; he realizes that he will not receive retirement benefits while employed; however, he is concerned as to whether or not his return to State employment will cause a forfeiture of his present retirement benefits.

Of course we cannot render an official opinion upon his request; however, enclosed is Opinion No. 86, Stone, 8-18-52, which I believe answers his question. Opinion 86 holds that where a teacher acquires a vested right of retirement benefits under the Public School Retirement System he does not forfeit his benefits by continuing to teach after mandatory retirement age.

Mr. Smith, age 61, is not even at mandatory retirement age; further, I am not aware of any provision of the State retirement law which would prevent the resumption benefits after this second employment was terminated.

Very truly yours,

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NORMAN H. ANDERSON  
Attorney General

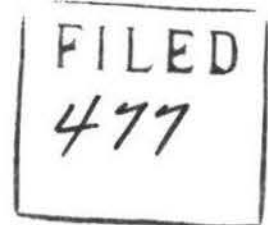
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Enclosure

cc: Harry W. Smith, Sweet Springs, Mo.  
Mr. Ed Bode, State Retirement System

December 22, 1965

OPINION LETTER NO. 477

Honorable Thomas A. David  
Director, Department of Revenue  
Jefferson Building  
Jefferson City, Missouri



Dear Mr. David:

This is in answer to your question as to the legality of your office advising the office of the prosecuting attorney of the home address furnished on the tax returns of certain named parties. The reason given for this request is that the prosecuting attorney has filed ouster suits against these parties for lack of residence.

Section 143.270, RSMo 1959, makes it illegal to divulge any information relative to or the contents of any income tax return filed under Chapter 143. Paragraph 2 of this section contains several exceptions to this requirement, one of which reads as follows:

"\* \* \* provided, however, that this section shall not prohibit the director of revenue nor any agent, clerk or inspector from proceeding in the discharge of their official duties in the administration of the income tax laws, nor from giving evidence in any court, or before the state tax commission, in any proceeding brought to collect any tax due hereunder or to question or determine the validity or correctness of any assessment by the director of revenue under the terms of this chapter, or to punish any person for making false or fraudulent returns; \* \* \* But no return regarding income tax, as provided for in this chapter, may otherwise be used as evidence in support of any charge of inaccuracy, delinquency or misconduct in the filing of tax returns required by law to be

Honorable Thomas A. David

filed with the director of revenue other than returns dealing with income tax as provided in this chapter."

We enclose herewith two opinions of this office which discuss the duties of the director of revenue in cases of this kind; the first No. 314 written to the Honorable M. E. Morris, Director of Revenue, in 1964, and the second to the Honorable Forrest Smith, then State Auditor on July 20, 1939.

However, it seems clear from the above quoted portion of Section 143.270, that such information may be given only in certain cases dealing with income tax returns. The question of residency of an officeholder is not relevant to any present charge of filing or failing to file accurate income tax returns. It is my opinion that neither you nor your agents should voluntarily provide the information requested.

Of course, if you are properly served with a subpoena requiring your testimony, the subpoena should be honored and the question of the propriety of divulging such information would be before the court.

Very truly yours,

NORMAN H. ANDERSON  
Attorney General

By  
John G. Denman

Enclosures: Op. No. 314  
10-5-64, Morris

Op. No. 83  
7-20-74, Smith